

(26,503)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 445.

NORTHERN PACIFIC RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 I. *Petition and Appendix "A."* Filed Jan. 13, 1912.

In the Court of Claims of the United States.

No. 31304.

NORTHERN PACIFIC RAILWAY COMPANY

vs.

THE UNITED STATES.

Filed Jan. 13, 1912.

Petition.

To the Honorable the Chief Justice and Associate Justices of the Court of Claims:

Your petitioner, the Northern Pacific Railway Company, respectfully represents:

I.

2 Petitioner is a corporation organized and existing under the laws of the State of Wisconsin, and owns and operates, and at the times hereafter stated did own and operate, a system of railway extending from Ashland, Wisconsin, and St. Paul, Minnesota, on the east, to the cities of Portland, Oregon, and Tacoma and Seattle, Washington, on the west, and is operating also branch lines and extensions from the main lines of said system, over all of which said lines and branches petitioner is now, and at the times hereinafter stated was, transporting the United States mails.

II.

That petitioner is the lawful successor of the Northern Pacific Railroad Company, a corporation created by the act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route" (13 Stats., p. 365), and as such successor became entitled to receive and enjoy the grants of right of way and of the public lands made by the aforesaid act of Congress, and subject to the rights, duties and obligations thereby imposed, including the express agreement made in section 11 thereof:

"That said Northern Pacific Railroad, or any part thereof, shall be a post route and a military road, subject to the use of the United States, for postal, military, naval, and all other Government service,

and also subject to such regulations as Congress may impose restricting the charges for such Government transportation."

3 That by reason of its ownership of other parts of the Northern Pacific Railway System your petitioner is further subject to the land-grant conditions expressed in the act of Congress approved May 5, 1864 (13 Stats., p. 64), entitled, "An act to make a grant of lands to the State of Minnesota to aid in the construction of a railroad from St. Paul to Lake Superior," wherein, and among other considerations moving the United States in the making of said grant, it was provided:

"Sec. 7. And be it further enacted, That the United States mail shall be transported over said road, under the direction of the Post-Office Department, at such price as Congress may by law direct: Provided, That until such price is fixed by law the Postmaster-General shall have the power to determine the same."

That by reason of its ownership of other parts of the Northern Pacific Railway System your petitioner is further subject to the land-grant conditions expressed in the act of Congress approved March 3, 1865 (13 Stat., p. 526), entitled, "An act extending the time for the completion of certain land-grant railroad in the States of Minnesota and Iowa, and for other purposes," wherein, and among other considerations moving the United States in the making of said grant, it was provided:

4 "Sec. 8. And be it further enacted that the United States mail shall be transported on said road, under the direction of the Post-Office Department, at such price as Congress may by law provide: Provided, That until such price is fixed by law the Postmaster-General shall have the power to fix the rate of compensation."

And your petitioner is also subject to the terms, conditions and requirements of section 214 of the act of Congress of June 8, 1872, entitled, "An act to review, consolidate and amend the statutes relating to the Post-Office Department," 17 Stats., p. 309, which provide as follows:

"Sec. 214. That all railway companies to which the United States have furnished aid by grant of lands, right of way, or otherwise, shall carry the mails at such prices as Congress may by law provide; and, until such price is fixed by law, the Postmaster-General may fix the rate of compensation."

III.

That your petitioner is now, and, at all times hereafter stated was, a common carrier for hire and reward, and that in the transportation by it of the United States mails over its several lines of railway, as aforesaid, the initial and terminal points of the several mail routes thereover, as fixed by the Post-Office Department, and the number given by said Department to each of said routes, is shown by the schedule hereunto annexed, marked "A," and made a part of this petition.

5

IV.

That the act of Congress approved June 8, 1872, entitled, "An act to revise, consolidate and amend the statute relating to the Post-Office Department," contained, among others, the following section:

"That the Postmaster-General shall arrange the railway routes on which the mail is carried, including those in which the service is partly by railway and partly by steamboat, into three classes, according to the size of the mails, the speed at which they are carried, and the frequency and importance of the service, so that each railway company shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed" (17 Statutes at Large, p. 309.)

In undertaking to apply this section the Postmaster-General found that, with such authority and facilities as he had, the satisfactory determination of the quantities of mail carried by the railway companies would be extremely difficult, and, because of a recommendation in his report for the fiscal year ending June 30, 1872, Congress, in an act approved March 3, 1873, making appropriation for the expenses of the Post-Office Department for the fiscal year ending June 30, 1874, provided for the ascertainment of the weights of the mails carried on railroad routes, as follows:

6 "For increase of compensation for the transportation of mails on railroad routes upon the condition and at the rates hereinafter mentioned, five hundred thousand dollars, or so much thereof as may be necessary: Provided, That the Postmaster-General be, and he is hereby, authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned to wit: That the mails shall be conveyed with due frequency and speed; that sufficient and suitable room, fixtures and furniture, in a car or apartment properly lighted and warmed, shall be provided for route agents to accompany and distribute the mails, and that the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; five hundred pounds, seventy-five dollars; one thousand pounds, one hundred dollars; one thousand five hundred pounds, one hundred and twenty-five dollars; two thousand pounds, one hundred and fifty dollars; three thousand five hundred pounds, one hundred and seventy-five dollars; five thousand pounds, two hundred dollars, and twenty-five dollars additional for every additional two thousand pounds, the average weight to be ascertained in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster-General may direct" (17 Statutes at Large, sec. 1, p. 558).

This section remained in effect until the passage of an act by Con-

gress approved March 3, 1905 (33 Stats., p. 1082), providing for the expense of the postal service for the year ending June 30, 1906. By that act (of March 3, 1905) the Postmaster-General was directed to ascertain the average weight of mails on each railroad route by causing the mails to be weighed for not less than ninety (90) "successive working days" after June 30, 1906, and thereafter, for the same period, not less frequently than once in four years. These enactments (of June 8, 1872, and March 3, 1905) are still in effect, and under them, and the said act of March 3, 1873, the mails transported by your petitioner on said routes have been weighed for the term respectively prescribed once in each four years, and the result stated and verified in the form and manner directed by the Postmaster-General.

V.

That both before and since the passage of said act of March 3, 1873, and to the present time, trains were operated by many of the railway companies of the United States on the secular days alone, and many trains operated by other companies on Sunday, 8 corresponding with trains which carried the mails on secular days, did not carry any mails. The delivery of a large part of the mails, over these lines where none was carried on Sunday, was necessarily retarded one day or more; and additional delay frequently resulted from the accumulation of mails thus arising through the first secular day. As a rule the delivery of the mails was, and it still is, much more even and prompt throughout the week when trains were and are operated and mails carried every day. During said period many trains were operated on less than six of the secular days and not on Sunday, and those carried mails which were accumulated during the days when they were not operated, and there was a corresponding delay of delivery in the mails so accumulated as compared with those carried on trains operated every day of the week.

VI.

That the said provision in the act approved June 8, 1872, was practically a copy of a clause in an act of Congress approved March 3, 1845 (5 Stats. at L., p. 738). Beginning in the year 1867, and for the purpose of fixing the compensation of the railroad companies, for contract periods of four years for transporting the United States mails, the mails carried by such railroad companies were weighed, or the weights thereof were estimated, by the railroad companies themselves, under directions of the Postmaster-General, 9 for thirty consecutive working days designated by him, and also for all Sundays intervening among such working days on which mails were transported; but, without regard to the number of days in the week on which the trains were operated and mails carried, the aggregate weights of the mails so ascertained were divided by the full number of secular or working days (to the exclusion of Sundays) included in the weighing period in order to deter-

mine the average daily weights of mails carried. The act of Congress approved March 3, 1875, making appropriations for expenses of the Post-Office Department for the fiscal year terminating on June 30, 1876, contains the following provision relating to the duties of the Second Assistant Postmaster-General:

"And he is hereby directed to have the mails weighed as often as now provided by law by the employees of the Post-Office Department, and have the weights stated and verified to him by the said employees under such instructions as he may consider just to the Post-Office Department and the railroad companies" (18 Stats. at L., p. 341).

In the year 1867 and thereafter the weighings of the mail for the purpose of fixing the basis for computing the compensation of the railroad companies, including your petitioner, were conducted by the Post-Office Department, and until the year 1907 there

10 was no change made in the plan as above set forth of weighing and of computing the average daily weights of the mails.

Prior to the year 1907, regardless of the number of days on which trains were operated and mails carried by your petitioner and the other mail-carrying railways, the mails carried by them were weighed on all the days of service falling among the designated working days, and the aggregate weights for the weighing period were divided by the full number of secular days only in such period, in order to determine the average daily weights of the mails carried and to fix the basis upon which the compensation of your petitioner and the other mail-carrying railroads should be computed. Your petitioner avers that from the year 1867 down to June 30, 1907, the mail-carrying railways of the country have, for transporting the United States mails, received compensation based upon daily average weights of mails determined by the use of the number of secular or working days only as a divisor as hereinabove stated.

The Second Assistant Postmaster-General, in his report for the year 1878 (page 61), said:

"In 1867 the service rendered by railroad companies was gauged by the system substantially embodied in the act of 1873."

This report was communicated to Congress as a part of the report of the Postmaster-General for that year.

11

VII.

That one of the purposes of said enactments of June 8, 1872, March 3, 1873, and March 3, 1875, was that railroad companies transporting the mails every day in the week, and thereby furnishing a better service, should not receive less compensation for the same aggregate weights of mail carried during the same periods than companies which transported the mails a less number of days in the week.

When preparing to put into effect said acts of Congress approved March 3, 1873, and March 3, 1875, the postal authorities conferred with many managers of railroad companies, and agreed with them that the purposes of Congress could not be effected and justice done

to the railroad companies except by said existing plan of weighing the mails for every day of service included in the weighing periods and dividing the total weights by the full number of secular days included in said periods. In the year 1875 the Postmaster-General reported to Congress that the pay of all railroad companies for carrying the mails was then fixed on the basis of weights carried, and that the Post-Office Department and the railroad managers were in full agreement upon the methods of weighing and of determining the average weights, as hereinabove set out.

12

VIII.

That, while construing and applying the laws in the way hereinbefore stated, officers of the Post-Office Department at times expressed their disapproval of the method established as aforesaid for arriving at the basis upon which to determine the rates of compensation to be paid railroad companies for carrying the mails. The Postmaster-General, in a report for the fiscal year ending June 30, 1881, and the Second Assistant Postmaster-General, in a report for the fiscal year ending June 30, 1882, expressed unfavorable views on the existing law with respect to said method. In a report for the fiscal year ending June 30, 1884, the Postmaster-General made similar criticisms of said law, and on his recommendation a bill was introduced in the House of Representatives to strike out the word "working" from the phrase "working days" in said act approved March 3, 1873; but no action was taken by the House on said bill. In September, 1884, the Postmaster-General also prepared an order in the words following:

"Order No. 44.—Hereafter when the weight of mails is taken on the railroad routes performing service seven days per week the whole number of days the mails are weighed, whether thirty or thirty-five, shall be used as a divisor for obtaining the average weight per day."

13

Deferring the promulgation of said order, the Postmaster-General addressed a communication to the Attorney-General in which he showed the operation of the law in said particular, as construed by himself and his predecessors, to be as herein alleged, and inquired the opinion of the Attorney-General as to the proper construction of the same. In a reply of date October 31, 1884, the Acting Attorney-General communicated to the Postmaster-General his opinion that said construction of said act, on which the postal authorities had been and were acting, was correct, and that any departure from that construction "would defeat the intention of the law" (18 Attorney-General's Opinions, p. 71). In consequence of said opinion of the Attorney-General the Postmaster-General refrained from enforcing or promulgating his said order.

IX.

That, complying with a resolution adopted by the Senate on January 19, 1885, the Postmaster-General, on January 21, 1885, trans-

mitted to the Senate a letter in which he gave "a documentary history of the railway mail service from its origin in 1834 to the present time." Said communication contains the following explanation of the existing system of weighing the mails and computing the daily average weights:

14 "Some little controversy at one time existed as to the justice of the present methods of obtaining the average daily weight to be taken as a basis for determining the annual pay, but a little examination made it clear that no other way of proceeding could be so just as that now in vogue.

* * * * *

"The present rule is, on those roads carrying the mails six times a week, to weigh the mails on thirty consecutive days on which the mails are carried, which would cover a period of thirty-five days; dividing the aggregate thirty weighings by thirty will give the daily average. On those roads carrying the mails seven times per week the weighing is done for thirty-five consecutive days (including Sundays) and the aggregate divided by thirty for a basis of pay.

"It is evident that the period during which the weighing is continued covers, in both cases, all the mails carried for thirty-five days. If, in the second case, we should take our basis from an average obtained by dividing the aggregate weight by thirty-five we would commit the absurdity of putting a premium upon inefficiency, for evidently if the Sunday train were cut off we should virtually have the same mails less frequently carried, and therefore with a higher daily average, and therefore a higher pay basis than in the case where the seventh train was run and the greater accommodation rendered.

"The present method gives no additional pay for the additional train, but the other method would cause a reduction on account of better service, and practically would operate as a fine on all
15 those roads carrying the mails daily, and including Sunday"
(Senate Ex. Doc. 40, 48th Congress, 2d Session).

X.

That during the thirty-four years following the enactment of March 3, 1873, rates paid to railroad companies, including your petitioner, under said acts, for transporting the mails, the apportionment of pay between relatively small and relatively large quantities of mail and said plan established and applied in determining the average daily weights for which the carriers should be paid were many times discussed by committees of both houses of Congress, by commissions appointed by Congress to investigate and make recommendations regarding the postal service, by chairmen of committees and other members, in open session of both of said houses.

XI.

That at the second session of the Fifty-ninth Congress the committee of the House of Representatives on Post Offices and Post Roads

prepared a bill, which was passed after much debate and amendment in both houses, entitled, "An act making appropriations for the fiscal year ending June 30, 1908, and for other purposes," being
16 approved on March 2, 1907. In said bill said committee inserted a provision that the Postmaster-General should cause the mails to be weighed once in each four years' period, commencing June 30, 1907, for not less than one hundred and five (105) "successive days," and that in ascertaining the daily average weight of mails carried by the railroad companies, including your petitioner, the total for said weighing period should be divided by said full number of days. In reporting said bill to the House the chairman of said committee spoke at length of the history of said divisor theretofore used in fixing the average weights of the mails, and informed the House of the conditions, hereinbefore recited, which caused the establishment of the same; of said report of the Postmaster-General for the year 1875, and of said contemplated order of the Postmaster-General of September, 1884, the adverse opinion of the Attorney-General thereon and the cancellation thereof. After debate occupying parts of five days the House rejected said provision in the appropriation bill. Subsequently during said session said plan reported by the committee for calculating the weights of the mails was three times brought before the House and each time the House rejected it.

XII.

That by an act of Congress approved July 12, 1876, first effective for the fiscal year ending June 30, 1877, the rates of pay with
17 respect to weight of mails authorized by said act of March 3, 1873, were reduced ten (10) per cent, and by an act approved June 17, 1878, a reduction of five (5) per cent was made from the rates resulting from the act of July 12, 1876. Thereafter the law was not changed with regard to the rates to be paid railroad companies for carrying the mails until the passage of said act of March 2, 1907. The text of that part of said act which relates to the rates of pay with respect to weight of mails is as follows:

"The Postmaster-General is hereby authorized and directed to readjust the compensation to be paid from and after the first day of July, nineteen hundred and seven, for the transportation of mail on railroad routes, carrying their whole length an average weight of mails per day of upward of five thousand pounds by making the following changes in the present rates per mile per annum for the transportation of mail on such routes, and hereafter the rates on such routes shall be as follows: On routes carrying their whole length an average weight of mail per day of more than five thousand pounds and less than forty-eight thousand pounds the rate shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds, and on routes carrying their whole length an average weight of mail per day of more than forty-eight thousand pounds the rates shall be five per centum less than the present rates
18 on all weight carried in excess of five thousand pounds up to forty-eight thousand pounds, and for each additional two thousand pounds, in excess of forty eight thousand pounds

at the rate of nineteen dollars and twenty-four cents upon all roads other than land-grant roads, and upon all land-grant roads the rate shall be seventeen dollars and ten cents for each two thousand pounds carried in excess of said forty-eight thousand pounds" (34 Stats. at L., p. 1212).

That notwithstanding the refusal of Congress to change the law in accordance with the recommendation of the Post-Office Department (see ante, section VIII) with respect to the ascertainment of the average daily weights of mail carried by the railroad companies, including your petitioner, the Postmaster-General decided that he would, in actual practice, change the method of ascertaining the average daily weights of the mail so as to conform to his views, as embodied in said recommendation, by including in the divisor all Sundays on which the mails were weighed, and he, to this end, and in excess of his powers under the law then and now in force, on March 2, 1907, and June 7, 1907, respectively, issued and subsequently enforced the following orders, by which the divisor was unlawfully increased, and your petitioner's compensation for transporting the United States mails thereby unlawfully reduced as hereinafter set forth:

19 "Order No. 165: That when the weight of mail taken on railroad routes the whole number of days the mails are weighed shall be used as a divisor for obtaining the average weight per day."

"Order No. 412: Ordered, that Order 165, dated March 2, 1907, be, and the same is hereby, amended to read as follows:

"That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day."

XIII. .

That for many years it has been the practice and custom of the Post-Office Department to contract with the railroad companies, including your petitioner, for carrying the United States mails, by transmitting to them agreements (otherwise called "Distance Circulars") to be filled out, signed and returned by the railway companies to said Department.

20 That in accordance with such practice, and following said custom, the Second Assistant Postmaster-General, in or about the month of June, 1907, to close agreements with your petitioner for the transportation by it of the United States mails on its routes Nos. 139067, 141001, 141007, 141008, 141011, 141033, 141035, 141036, 141042, 141046, 141051 and 141061 (see Appendix "A" for termini) during the four fiscal years commencing July 1, 1907, mailed to your petitioner, with reference to each of said routes, a printed form (Distance Circular), on which it was requested that the distances between all stations on the road be stated, and your petitioner's consent to render the service proposed on the basis of those distances and for the compensation therefor to be fixed in

accordance with the law, and with "the regulations of the Department applicable to railroad mail service" be noted.

That in accordance with the same practice, and following the same custom, the Second Assistant Postmaster-General in or about the month of February, 1910, to close agreements with your petitioner for the transportation by it of the United States mails for the other mail routes on your petitioner's lines of railway, as noted in the Appendix "A" hereto, for the four fiscal years beginning July 1, 1910, mailed to your petitioner, with reference to each of said routes, a like printed form on which it was also requested that the distances between all stations on the route be stated, and your petitioner's consent to render the service proposed on the basis of those distances and for the compensation therefor to be fixed in accordance with the law, and with "the regulations of the Department applicable to railroad mail service," be noted.

The regular form of agreement between the Post-Office Department and your petitioner covering each and all of the above
21 named routes, is printed on page two of said form, and is in the following words, to wit:

"The company named below agreed to accept and perform mail service upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service."

That said agreements with reference to all of the routes herein-above mentioned and shown upon the Appendix "A" hereto attached, and made a part of this petition, was signed by your petitioner's duly authorized official, but before doing so he added, so as to appear over his official signature, the following words:

"Exception taken to Order No. 165, issued by the Postmaster-General March 2, 1907, and Order No. 412, issued June 7, 1907."

After signing said agreements (Distance Circulars), relating to the weighing of the year 1907, upon the routes as herein named as Nos. 139067, 141001, 141007, 141008, 141011, 141033, 141035, 141036, 141042, 141046, 141051, 141061 and 141066, they, together with the following letter of protest, signed by your petitioner's authorized attorneys, were delivered, on or about June 18, 1907, to the Second Assistant Postmaster-General:

22

"WASHINGTON, D. C., June 18, 1907.

"The Hon. Second Assistant Postmaster-General, Division of Railway Adjustment, Washington, D. C.

"SIR: We now return herewith, duly completed and executed, the Official Distance Circulars for those mail routes comprised by the lines of our company in Wisconsin and Minnesota, being Nos. 139067, 141001, 141007, 141008, 141011, 141033, 141035, 141036, 141042, 141046, 141051, 141061, and 141066, which have been prepared for your use in effecting readjustment of mail compensation in connection with the weighing which has just been completed.

"Without undertaking to materially change the form of the contract printed at the top of the second page of each circular, and signed by our General Manager, we have nevertheless taken the liberty of adding thereto a formal exception to both order No. 165, issued by

the Postmaster General on March 2, 1907, and Order No. 412, issued by the Postmaster-General on June 7, 1907. The contract in question obligates our company 'to accept and perform mail service upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail pay,' and we therefore beg leave to now formally advise, in submitting these Distance Circulars, that the service involved is accepted and our company agrees to perform same, with the proviso that by thus subscribing and delivering these circulars to the Department, our company does not agree to submit to any but lawful regulations by the Department, and on this point

23 our company does not concede the power of the Postmaster-General, through an order or through any other act of the Post-Office Department, to provide for changing the method of ascertaining the daily average weight of the mails carried over the routes named on the Distance Circulars herewith, unless authorized by proper Congressional enactment. In the view of our company there is no authority whatever in existing legislation for the aforesaid Orders Nos. 165 and 412, issued March 2, 1907, and June 7, 1907, respectively.

"The mails will be transported by our company, of course, as required by the public necessity, pending settlement of the rights of our company and of the United States in the question involved, i. e., the matter of ascertaining the average daily weights, with the consequent annual compensation for services performed over the route covered by the Distance Circulars herewith. In addition to thus assuring the transportation of the mails as heretofore, by way of adequately fulfilling the public necessities, we now record our company's formal refusal to accept the proposed method of ascertaining the average daily weight of mails carried, and fixing the annual rates of pay as provided by the orders of the Postmaster-General heretofore described, and our company also reserves all of its rights in the premises to hereafter take such action as may be found requisite toward determining the legal method of ascertaining the daily average weights of mails carried over each route, and the correct and legal rates of compensation for the services so rendered, in accord with the existing legislation which controls the matters involved.

24

"We trust that appropriate adjustment in this connection may be effected without further material difficulty.

"Very respectfully,

"(Signed)

BRITTON & GRAY,

"Attorneys Northern Pacific Railway Co.

"(Enclosures.)"

And in returning the Distance Circulars for the weighing of 1910 to the Post-Office Department, same were also accompanied by a formal communication by the authorized attorneys of the petitioner, which reads as follows:

"JULY 11, 1910.

"Hon. Second Assistant Postmaster-General, Division of Railway Adjustment, Washington, D. C.

"DEAR SIR: We enclose herewith properly filled out and signed Distance Circulars covering routes of the Northern Pacific Railway Company for the term beginning July 1, 1910, as follows:

"Route	Nos.	161005,	161006,	161007,	161013,	161016,
161017,	161025,	161030,	161036,	161041,	163002,	163003,
163004,	163007,	163008,	163009,	163011,	163012,	163013,
163014,	163017,	163020,	163022,	170003,	170008,	170011,
171001,	171005,	171009,	171012,	171013,	171015,	171016,
171018,	171019,	171020,	171021,	171025,	171029,	171030,
171032,	171035,	171037,	171043,	171044,	171045,	171053,
171054,	171062,	171064,	171070,	173016,		

25 "You will note that our company agrees to accept and perform mail service over the above routes upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service, except those carried by Order No. 165, issued by the Postmaster-General, March 2, 1907, and Order No. 412, issued by the Postmaster-General, June 7, 1907.

"Very respectfully,

"(Signed)

BRITTON & GRAY,

"Att'ys Northern Pacific R'y Co.

"(Enclosures.)"

Petitioner further avers that the modification made in the formal agreements as above set forth were made by your petitioner covering each and all of the above-mentioned mail routes, which agreements, together with the letter of protest as above set forth, were on file with the Post-Office Department at the beginning of the contract periods, respectively, for each of said routes. Under said protests your petitioner has since performed the services so required and provided for and has received under such protests the mail pay warrants delivered to your petitioner for the amounts of its compensation therefor as determined by the application of said Order No. 412 earned during the fiscal years ending June 30, 1908, June 30, 1909, June 30, 1910, and June 30, 1911. And your petitioner further avers that because

26 of the duties and obligations imposed upon it by law as a common carrier, and especially because of the land-grant conditions hereinabove set forth, it was powerless to exercise the alternative of refusing to transport the United States mails when tendered to it for carriage. For which reasons also your petitioner protested always, as hereinafter set forth, against said Orders Nos. 165 and 412 of the Postmaster-General, as not representing the method prescribed by law of ascertaining the basis upon which your petitioner's compensation for carrying the mails should be computed; and your petitioner avers that said orders were not only a wide departure from all antecedent practice of the Post-Office Department, but were and are violative of the express provisions of the law applicable to railway mail service.

XIV.

That the said Orders Nos. 165 and 412, issued by the Postmaster-General as aforesaid, were wrongfully put into effect by that official July 1, 1907, on those mail routes on the lines of railroad owned and operated by your petitioner. The Post-Office Department in putting said orders into effect upon the mail routes of your petitioner's said lines of railway as aforesaid, and calculating the daily average weight of mails carried by your petitioner on its said mail routes by including Sundays in the number of days in the weighing period, thus making the divisor 105 days instead of 90 days, as required by law and the former constant ruling and practice of the Post-Office Department, has caused the mail transportation earnings of your petitioner's said lines of railroad to be unlawfully reduced annually, the amount of which for the fiscal years ended June 30, 1908, June 30, 1909, June 30, 1910, and June 30, 1911, aggregates the sum of, to wit, one hundred and sixty thousand one hundred and fifteen dollars and forty-eight cents (\$160,115.48), all of which will fully appear from the annexed statement, Appendix "A," made part of this petition.

XV.

Your petitioner avers that there rests upon it a high obligation to perform its duties as a common carrier in the territory through which its lines of railway are constructed, and this obligation is the greater because there are no means of speedy transportation in many sections of said territory except over lines owned and operated by it. Your petitioner avers that it has at all times been a common carrier for hire and reward, and as such, as well as under the provisions of the land-grant acts aforesaid, was obliged to carry the United States mails when tendered to it for transportation; that after your petitioner signed the agreements modified by it as above set forth the United States, without any solicitation on the part of your petitioner, continued to tender and deliver to it for transportation its mails just as it had theretofore done; that your petitioner continued to transport said mails whenever they were tendered to it by the United States, and it respectfully insists that it is justly entitled to receive in payment for such services, in addition to the amount which it has heretofore received, as shown by the Appendix "A" annexed hereto, the amount here sued for, as the sum of said two amounts represents the compensation which your petitioner should receive if computed in accordance with the express provisions of the law applicable to railway mail service.

XVI.

Your petitioner is advised, and it so avers, that the issuance and application by the Postmaster-General of said Orders Nos. 165 and 412, dated respectively March 2, 1907, and June 7, 1907, by which the divisor for ascertaining the average daily weights of mails carried by your petitioner was changed from ninety days to one hundred

and five days, as above stated, were and are in excess of the authority vested in that officer by law, and in violation of the legal rights of your petitioner under the above-mentioned acts of Congress and the interpretation given thereto by both the postal authorities and the Attorney-General of the United States for many years prior to the

29 date of said orders; that the said sum of money shown to be due your petitioner by the annexed tabulated statement, Appendix "A," is justly due and owing to it by the United States, the same having been and still being unlawfully withheld from your petitioner by the United States and its postal authorities in the manner and for the reasons herein set forth; and that there exists in favor of the United States against your petitioner no debt, claim or set-off by which the said amount herein prayed for may or should be reduced.

Your petitioner prays, therefore, that this honorable court will render a judgment in its favor against the United States in the full sum of one hundred and sixty thousand one hundred and fifteen dollars and forty-eight cents (\$160,115.48), the same being due and wholly unpaid.

NORTHERN PACIFIC RAILWAY
COMPANY,
By HOWARD ELLIOTT,
President.

30 STATE OF MINNESOTA,
County of Ramsey, ss:

Before me, F. J. Gehan, a notary public in and for the State and county aforesaid, appeared Howard Elliott, known to me to be the president of the Northern Pacific Railway Company, and made oath before me that the allegations of said petition are true to the best of his knowledge, information and belief.

HOWARD ELLIOTT.

Subscribed and sworn to before me this 5th day of January, A. D. 1912.

F. J. GEHAN,
Notary Public, Ramsey County, Minnesota.

My commission expires April 5, 1918.

BRITTON & GRAY,
Attorneys for Claimant.

C. W. BUNN,
General Counsel.

APPENDIX A

NORTHERN PACIFIC RAILWAY COMPANY.

Statement Showing Loss in Mail Pay from July 1, 1907, to September 30, 1909, under Order No. 412 of the Postmaster General dated June 7, 1907, which provides that the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day.

Routes Weighed February 20—June 4, 1907.

Route.	From—	To—	105-day divisor.	90-day divisor.	Loss per annum.	Loss per quarter.	Total loss July 1, '07, to Sep. 30, '09, a years & 3 mos.
139067.	Ashland.	Superior, Wis.	\$3,846.16	\$4,123.94	\$277.78	\$69.44	\$625.00
141001.	St. Paul, Minn.	Fargo, N. D.	129,430.87	146,543.25	17,112.38	4,278.09	38,502.85
141007.	"	Duluth, Minn.	23,511.21	24,947.20	1,435.99	359.00	3,230.97
141008.	White Bear.	Stillwater, "	Minimum rate, not affected.				
141011.	Superior, Wis.	Staples, "	15,809.15	16,599.33	790.18	197.54	1,777.90
141033.	Wyoming, Minn.	Taylor's Fls., "	1,300.80	1,385.37	84.57	21.14	190.28
141035.	Duluth.	Fond du Lac, "	1,095.54	1,703.95	68.41	17.10	153.92
141036.	Carlton.	Cloquet, "	411.97	433.65	21.68	5.42	48.78
141042.	Wadena Jct.	Wahpeton, N. D.	7,096.41	7,747.50	651.09	162.77	1,464.95
141046.	Brainerd.	Morris, Minn.	9,015.71	9,687.61	671.90	167.97	1,511.77
141051.	Rush City.	Grantsburg, Wis.	1,004.00	1,091.32	87.32	21.83	196.47
141061.	Winnipeg Jct.	Grand Forks, N. D.	10,155.65	11,219.88	1,064.23	266.06	2,394.51
Total.....							\$5,566.36
							\$50,097.40

Losses by Quarters for Each Route.

Route.	139067	141001	141007	141011	141033	141035	141036	141042	141046	141051	141061	Total.
Quarter ending												
Sept. 30, 1907.	\$69.44	4,278.09	359.00	197.54	21.14	17.10	5.42	162.77	167.97	21.83	266.06	\$5,566.36
Dec. 31, 1907.	69.44	4,278.09	359.00	197.54	21.14	17.10	5.42	162.77	167.97	21.83	266.06	5,566.36
Mar. 31, 1908.	69.45	4,278.10	359.00	197.55	21.14	17.10	5.42	162.77	167.98	21.83	266.06	5,566.40
June 30, 1908.	69.45	4,278.10	358.99	197.55	21.15	17.11	5.42	162.78	167.98	21.83	266.05	5,566.41
Sept. 30, 1908.	69.44	4,278.09	359.00	197.54	21.14	17.10	5.42	162.77	167.97	21.83	266.06	5,566.36
Dec. 31, 1908.	69.44	4,278.09	359.00	197.54	21.14	17.10	5.42	162.77	167.97	21.83	266.06	5,566.36
Mar. 31, 1909.	69.45	4,278.10	359.00	197.55	21.14	17.10	5.42	162.77	167.98	21.83	266.06	5,566.40
June 30, 1909.	69.45	4,278.10	358.99	197.55	21.15	17.11	5.42	162.78	167.98	21.83	266.05	5,566.41
Sept. 30, 1909.	69.44	4,278.09	358.99	197.54	21.14	17.10	5.42	162.77	167.97	21.83	266.05	5,566.34
Totals....	\$625.00	38,502.85	3,230.97	1,777.90	190.28	153.92	48.78	1,464.95	1,511.77	196.47	2,394.51	50,097.40

Statement Showing Loss in Mail Pay from October 1, 1909, to June 30, 1911, under Order No. 412 of the Postmaster General dated June 7, 1907, which provides that the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day.

Routes Weighed February 20th to June 4th, 1907.

Route.	From—	To—	100-day divisor.	90-day divisor.	Loss per annum.	Loss per quarter.	Total loss Oct. 1, '09, to June 30, '11, 1 year & 9 mos.
139067.	Ashland.	Superior, Wis.	\$3,846.16	\$4,123.94	\$277.78	\$69.44	\$416.67 To Mar. 31, 1911.
"	"	"	3,825.16	4,101.42	276.26	69.06	69.06 Apl., May & June, 1911.
141001.	St. Paul.	Fargo, N. D.	129,430.87	146,543.25	17,112.38	4,278.09	12,834.27 To June 30, 1910.
"	"	"	129,685.34	146,831.36	17,146.02	4,286.50	17,146.02 July 1/10-June 30/11.
141007.	"	Duluth, Minn.	23,511.21	24,947.20	1,435.99	359.00	2,512.98
141008.	White Bear.	Stillwater, Minn.		(Minimum rate not affected.)			
141011.	Superior, Wis.	Staples, Minn.	15,800.15	16,599.33	790.18	197.54	1,382.80
141033.	Wyoming, Minn.	Taylor's Falls, Minn.	1,300.80	1,385.37	84.57	21.14	147.99
141035.	Duluth.	Fond du Lac.	1,695.54	1,763.95	68.41	17.10	119.71
141036.	Carlton.	Cloquet.	411.97	433.65	21.68	5.42	37.94
141042.	Wadena Jet.	Wahpeton, N. D.	7,096.41	7,747.50	651.09	162.77	1,139.40
141046.	Brainerd.	Morris, Minn.	9,015.71	9,687.61	671.90	167.97	1,175.81
141051.	Rush City.	Grantsburg, Wis.	1,004.00	1,091.32	87.32	21.83	152.81
141051.	Winnipeg Jct.	Grand Forks, N. D.	10,155.65	11,219.88	1,064.23	266.06	1,064.00 To Sept. 30, 1910.
"	"	"	10,666.60	11,121.49	1,054.89	263.72	791.16 Oct. 1/10-June 30/11.
							<hr/>
							\$38,990.62
							=====

Total loss
July 1, '16, to
June 30, '17,
one year.

161013.	Fargo, N. D.	161013.	163,351.88	182,340.88	18,986.00	4,746.50	18,986.00
161005.	"	Streeter, N. D.	12,376.02	13,407.35	1,031.33	257.83	1,031.33
161006.	Jamestown.	Leeds	9,299.89	10,036.56	736.67	181.17	736.67
161007.	Sanborn.	McHenry	4,525.37	4,848.62	323.25	80.81	323.25
161016.	Grand Forks.	Pembina	6,762.57	7,245.61	483.04	120.76	483.04
161017.	Wahpeton.	Jamestown	9,491.55	10,106.84	615.29	153.82	615.29
161025.	McKenzie.	Linton	1,930.16	1,930.16	(Minimum rate not affected.)		
161030.	Casselton.	Marion	3,775.18	3,982.05	206.87	51.71	206.87
161036.	Carrington.	Turtle Lake	5,902.87	6,340.15	437.28	109.32	437.28
161041.	Oberon.	Esmond	1,441.94	1,772.92	330.98	82.74	330.98
163014.	Miles City.	Spokane	206,321.90	228,619.77	22,297.87	5,574.46	22,297.87
153002.	Logan.	Butte	21,926.73	24,152.57	2,225.84	556.46	2,225.84
163003.	Whitehall.	Alder	2,995.26	3,190.00	194.74	48.68	194.74
163004.	Drummond.	Phillipsburg	1,206.15	1,274.56	68.41	17.10	68.41
163007.	Clough Jet.	Marysville	537.79	537.79	(Minimum rate not affected.)		
163008.	Nissoula.	Darby	5,545.53	5,989.17	443.64	110.91	443.64
163009.	Butte.	Garrison	14,964.13	16,424.13	1,460.00	365.00	1,460.00
163011.	Laurel.	Red Lodge	3,395.89	3,624.85	228.96	57.24	228.96
163012.	Livingston.	Gardiner	3,122.90	3,402.59	279.69	69.92	279.69
163013.	Siletia.	Bridge	1,058.88	1,126.12	67.24	16.81	67.24
163017.	De Smet.	Wallace	10,227.37	10,997.86	770.49	192.62	770.49
163020.	Sappington.	Norris	1,003.08	1,074.74	71.66	17.91	71.66
163022.	Harrison.	Pony	512.50	518.73	6.22	1.55	6.22
170003.	Wallace	Burke, Idaho	353.08	377.43	24.35	6.08	24.35
170008.	Marshall.	Lewiston	23,890.04	25,117.18	1,227.14	306.78	1,227.14
170011.	Arrow.	Stites	4,541.17	4,865.55	324.38	81.09	324.38
171001.	Tacoma	Portland	35,778.11	39,260.89	3,482.78	870.69	3,482.78
171005.	Burnett.	Wilkeson	285.57	285.57	(Minimum rate not affected.)		

To April 4, 1911.
Apr. 4-June 30/11.

		81,637.95	6,462.92	1,615.73	4,918.99
171009. " Spokane.	Auburn	75,175.03			1,543.68
" "	"	75,160.29			2,012.42
171012. Seattle.	Tacoma	16,805.48	2,012.42	503.10	88.57
171013. Pasco.	Walla Walla	1,085.21	88.57	22.14	116.23
171015. Pullman.	Genesee	1,442.93	116.23	29.05	
171016. Junction.	Fairfax	419.37	(Minimum rate not affected.)		
171018. North Bend.	Black River	4,253.34	308.09	77.02	308.09
171019. Hartford.	Robe	581.40	(Minimum rate not affected.)		
171020. Sunas.	Seattle	15,391.14	1,625.20	406.30	1,625.20
171021. Cheney.	Adrian	12,776.70	1,190.43	297.60	1,190.43
171025. Attalia.	Dayton	6,171.13	435.65	108.91	435.65
171029. Centralia.	Gate	888.82	56.33	14.08	56.33
171030. Kanaskat.	Keriston	651.08	(Minimum rate not affected.)		
171032. Lakeview.	Hoquiam	12,853.90	676.99	169.24	676.99
171035. Clealum.	Roslyn	174.44	12.73	3.18	12.73
171037. Chehalis.	South Bend	5,413.89	501.29	125.32	501.29
171043. Arlington.	Darrington	1,228.63	(Minimum rate not affected.)		
" "	"	1,229.05	(Minimum rate not affected.)		
171044. Bellingham.	Wickersham	1,420.36	71.93	17.98	71.93
171045. Vancouver.	Yacolt	1,247.97	92.45	23.11	92.45
171053. Palmer Jet.	Meeker Jet.	2,020.57	705.98	176.49	705.98
171054. Hoquiam.	Moclips	1,234.75	72.78	18.19	72.78
171062. Sunnyside.	Grandview	1,312.59	138.17	34.54	138.17
171064. Coulee City Jet.	Coulee City	178.89	9.55	2.39	9.55
171070. Lewiston Jet.	Snake River Jet.	1,937.19	125.88	31.47	125.88
171016. Hunts Jet.	Pendleton, Ore.	1,732.65	(Minimum rate not affected.)		

Total July 1, 1910, to June 30, 1911 \$71,027.46
Total Oct. 1, 1909, to June 30, 1911 38,000.62

Grand total..... \$110,018.08

Losses by Quarters for Each Route.

Route No. Quarter ending-	139067	141001	41007	141011	141033	141035	141036	141042	141046	141051	141061	Total.
Dec. 31, 1909...	69.44	4,278.09	359.00	197.54	21.14	17.10	5.42	162.77	167.97	21.83	266.06	5,566.36
Mar. 31, 1910...	69.45	4,278.09	359.00	197.54	21.14	17.10	5.42	162.77	167.97	21.83	266.06	5,566.37
June 30, 1910...	69.44	4,278.09	358.99	197.55	21.14	17.10	5.42	162.77	167.98	21.83	266.05	5,566.36
Sept. 30, 1910...	69.45	4,286.50	359.00	197.54	21.15	17.11	5.42	162.78	167.97	21.83	265.83	5,574.58
Dec. 31, 1910...	69.44	4,286.51	359.00	197.54	21.14	17.10	5.42	162.77	167.97	21.83	263.72	5,572.44
Mar. 31, 1911...	69.45	4,286.50	358.99	197.55	21.14	17.10	5.42	162.77	167.98	21.83	263.72	5,572.45
June 30, 1911...	69.06	4,286.51	359.00	197.54	21.14	17.10	5.42	162.77	167.97	21.83	263.72	5,572.06
	\$485.73	20,980.29	2,512.98	1,382.80	147.99	119.71	37.94	1,139.40	1,175.81	152.81	1,855.16	\$8,990.62.
Route No. Quarter ending-	161005	161006	161007	161013	161016	161017	161030	161036	161041	163002	163003	Total.
Sept. 30, 1910...	\$257.83	184.17	80.81	4,746.50	120.76	153.82	51.71	109.32	82.74	556.46	48.68	6,392.80
Dec. 31, 1910...	257.83	184.16	80.81	4,746.50	120.76	153.82	51.72	109.32	82.75	556.46	48.69	6,392.82
Mar. 31, 1911...	257.84	184.17	80.82	4,746.50	120.76	153.82	51.72	109.32	82.74	556.46	48.68	6,392.83
June 30, 1911...	257.83	184.17	80.81	4,746.50	120.76	153.83	51.72	109.32	82.75	556.46	48.69	6,392.84
	\$1,031.33	736.67	323.25	18,986.00	483.04	615.29	206.87	437.28	330.98	2,225.84	194.74	25,571.29

Route No.	163004	163008	163009	163011	163012	163013	163017*	163014	163020	163022	170003	Total.
Quarter ending—												
Sept. 30, 1910...	17.10	110.91	365.00	57.24	69.92	16.81	192.62	5,574.46	17.91	1.55	6.08	6,429.60
Dec. 31, 1910...	17.10	110.91	395.00	57.24	69.92	16.81	192.63	5,574.47	17.92	1.56	6.09	6,429.65
Mar. 31, 1911...	17.11	110.91	365.00	57.24	69.93	16.81	192.62	5,574.47	17.91	1.55	6.09	6,429.64
June 30, 1911...	17.10	110.91	365.00	57.24	69.92	16.81	192.62	5,574.47	17.92	1.56	6.09	6,429.64
	\$68.41	443.64	1,460.00	228.96	279.69	67.24	770.49	22,297.87	71.66	6.22	24.35	25,718.53

Route No.	170008	170011	171001	171009	171012	171013	171015	171018	171020	171021	171025	Total.
Quarter ending—												
Sept. 30, 1910...	306.78	81.09	870.69	1,615.73	503.10	22.14	29.06	77.02	406.30	297.60	108.91	4,318.42
Dec. 31, 1910...	306.79	81.10	870.70	1,615.73	503.11	22.14	29.05	77.03	406.30	297.61	108.91	4,318.47
Mar. 31, 1911...	306.78	81.09	870.69	1,615.73	503.10	22.14	29.06	77.02	406.30	297.61	108.91	4,318.43
June 30, 1911...	306.79	81.10	870.70	1,615.48	503.11	22.15	29.06	77.02	406.30	297.61	108.92	4,318.24
	\$1,227.14	324.38	3,482.78	6,462.67	2,012.42	88.57	116.23	308.09	1,625.20	1,190.43	435.65	17,273.56

Route No.	171029	171032	171035	171037	171044	171045	171053	171054	171062	171064	171070	Total.
Quarter ending—												
Sept. 30, 1910...	14.08	169.24	3.18	125.32	17.98	23.11	176.49	18.19	34.54	2.39	31.47	615.99
Dec. 31, 1910...	14.08	169.25	3.19	125.32	17.99	23.12	176.50	18.20	34.54	2.39	31.47	616.05
Mar. 31, 1911...	14.09	169.25	3.18	125.33	17.98	23.11	176.49	18.19	34.55	2.39	31.47	616.03
June 30, 1911...	14.08	169.25	3.18	125.32	17.98	23.11	176.50	18.20	34.54	2.38	31.47	616.01
	\$56.33	676.99	12.73	501.29	71.93	92.45	705.98	72.78	138.17	9.55	125.88	2,464.08

Total Losses for Each Quarter.

Quarter ending December 31, 1909.....	\$5,566.36
March 31, 1910.....	5,566.37
June 30, 1910.....	5,566.36
September 30, 1910.....	23,331.39
December 31, 1910.....	23,329.43
March 31, 1911.....	23,329.38
June 30, 1911.....	23,328.79
	<hr/>
July 1, '07-Sept. 30, '09.....	\$110,018.08
	<hr/>
	\$50,097.40
	<hr/>
Total.....	160,115.48

[14560]

39 II. *Supplementary Petition. Filed June 29, 1917.*

To the Honorable Chief Justice and Associate Justices of the Court of Claims:

Comes now the claimant by its attorneys, and adopting the allegations of the original petition for this its supplemental petition, shows to the court the following facts:

I.

That your petitioner has transported mails of the United States during the years ending June 30, 1912, 1913, 1914, 1915,
40 1916, and 1917, as well as during the years ending June 30, 1908, 1909, 1910, and 1911, as set forth in the original petition herein.

II.

That in certifying for payment the petitioner's account for such transportation, the Post-Office Department applied Order 412, dated March 2, 1907, reading as follows:

"That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day."

That the deduction erroneously made by the Postmaster General and the accounting officers of the United States, on account of the application of said Order 412, resulted in unlawfully reducing compensation justly earned by your petitioner for the transportation of mails, as set forth in the original petition, and as set forth herein, amounting in the years ending June 30, 1912, 1913, 1914, 1915, 1916, and 1917, to the sum of seven hundred fifty thousand dollars (\$750,000.00).

III.

That the total of one hundred sixty thousand one hundred fifteen dollars and forty-eight cents (\$160,115.48) claimed under the
41 original petition, together with the sum of seven hundred fifty thousand dollars (\$750,000) claimed under this supplemental petition, is now justly due and owing to your petitioner from the United States; that there exists in favor of the United States no debt, claim or set-off by which said amount should be reduced, and that no part of said claim has been paid and the said claim has not been assigned in whole or in part.

Wherefore, your petitioner prays for judgment against the United States in the sum of seven hundred fifty thousand dollars (\$750,000.00) in addition to the sum of one hundred sixty thousand one hundred fifteen dollars and forty-eight cents (\$160,115.48) claimed in the original petition herein.

NORTHERN PACIFIC RAILWAY
COMPANY.

By BRITTON AND GRAY,

Its Attorneys-in-Fact.

DISTRICT OF COLUMBIA, ss:

Before me, Chester R. Smith, a notary public in and for the District of Columbia, personally appeared Alexander Britton, to me known and known to me to be a member of the firm of Britton and Gray, attorneys-in-fact for the Northern Pacific Railway Company, and made oath before me that the allegations of said petition
42 are true to the best of his knowledge, information, and belief.

ALEXANDER BRITTON.

Subscribed and sworn to before me this 28th day of June, A. D. 1917.

[SEAL]

CHESTER R. SMITH,
Notary Public.

[Endorsed:] In the Court of Claims of the United States. The Northern Pacific Railway Company vs. The United States. No. 31,304. Supplemental Petition. Britton and Gray, Wilkins Building, Washington, D. C.

43

III. *General Traverse.*

Court of Claims.

No. 31,304.

NORTHERN PACIFIC RAILWAY COMPANY

VS.

THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

44

IV. *Argument and Submission of Case.*

On January 21, 1918 the case was argued by Mr. Alexander Britton for the claimant.

On January 22, 1918 this and similar cases were argued by The Solicitor General, Mr. John W. Davis, and Assistant Attorney General, Mr. Huston Thompson, for the defendants.

On January 23, 1918 the argument was concluded by Mr. Britton, for the claimant, and the case was submitted.

45 V. *Findings of Fact, Conclusion of Law and Appendix.*
Filed March 11, 1918.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff herein is a corporation organized and doing business under the laws of the State of Wisconsin, and does now and at all the times hereinafter stated did not operate a system of railroads extending from Ashland, Wis., and St. Paul, Minn., on the east, to Portland, Oreg., and Seattle, Wash., on the west, with certain branch lines and extensions from the main lines of said system, over all of which lines and branches plaintiff is now and at the times hereinafter stated was transporting the United States mail on routes designated by the Postmaster General, as follows:

Route No.	Termini.	From—	To—	Land-grant portion.
139067	Ashland-Sta. B. Superior, Wis.	July 1, 1907	June 30, 1917	Entire route.
141001	St. Paul, Minn.-Fargo, N. Dak.	.....do.....	.....do.....	St. Paul-University Switch (n. o.), Watab-Little Falls; Staples-Fargo.
141007	St. Paul-Duluth, Minn.	.....do.....	.....do.....	St. Paul-West End (n. o.)
141008	Stillwater-White Bear Lake, Minn.	.....do.....	.....do.....	Entire route.
141011	Superior, Wis.-Staples, Minn.	.....do.....	.....do.....	Sta. B. Superior-Staples, Minn.
141033	Wyoming-Taylor's Falls, Minn.	.....do.....	.....do.....	None.
141035	Duluth-Fond du Lac, Minn.	.....do.....	.....do.....	Duluth-West End (n. o.)
41036	Carlton-Cloquet, Minn.	.....do.....	.....do.....	None.
41042	Wadena Jet. (n. o.), Minn.-Wahpeton, N. Dak.	.....do.....	.....do.....	None.
41046	Brainerd-Morris, Minn.	.....do.....	.....do.....	Brainerd-Little Falls.
141051	Rush City, Minn.-Grantsburg, Wis.	.....do.....	.....do.....	None.
141061	Winnipeg Jet. (n. o.), Minn.-Grand Forks, N. Dak.	.....do.....	June 30, 1911	None.
141061	Manitoba Jet. (n. o.), Minn.-Grand Forks, N. Dak.	.....do.....	June 30, 1917	None.
161005	Fargo-Streeter, N. Dak.	July 1, 1910do.....	None.
161006	Jamestown-Leeds, N. Dak.do.....do.....	None.
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161007	Sanborn-McHenry, N. Dak.	July 1, 1910	June 30, 1917	None.
161013	Fargo, N. Dak.-Miles City, Mont.do.....do.....	Entire route.
161016	Grand Forks-Femblina, N. Dak.	.....do.....	June 30, 1914	None.
161016	Grand Forks-Boundary Line (n. o.), N. Dak.	July 1, 1914	June 30, 1917	None.
161017	Wahpeton-Jamestown, N. Dak.	July 1, 1910	.....do.....	None.
161025	McKenzie-Linton, N. Dak.	.....do.....	.....do.....	None.
161030	Casselman-Marton, N. Dak.	.....do.....	.....do.....	None.
161036	Carrington-Turtle Lake, N. Dak.	.....do.....	.....do.....	None.
161041	Oberon-Esmond, N. Dak.	.....do.....	.....do.....	None.
163002	Logan-Butte, Mont.	.....do.....	.....do.....	None.
163003	Whitehall-Alder, Mont.	.....do.....	.....do.....	None.

163004	Drummond-Phillipsburg, Mont.	.....do.....	.....do.....	None.
163007	Clough Jct. (n. o.)-Marysville, Mont.	.....do.....	.....do.....	None.
163008	Missoula-Darby, Mont.	.....do.....	.....do.....	None.
163009	Butte-Garrison, Mont.	.....do.....	.....do.....	None.
163011	Laurel-Red Lodge, Mont.	.....do.....	June 30, 1914	None.
163011	Laurel Sta. (n. o.)-Red Lodge, Mont.	.....do.....	June 30, 1917	None.
163012	Livingston-Gardiner, Mont.	.....do.....	.....do.....	None.
163013	Silesia-Bridge, Mont.	.....do.....	.....do.....	Entire route.
163014	Hiles City, Mont.-Spokane, Wash.	.....do.....	.....do.....	None.
163017	Desmet Sta. (n. o.)-Mont.-Wallace, Idaho.	.....do.....	.....do.....	None.
163020	Sappington-Norris, Mont.	.....do.....	.....do.....	None.
163022	Harrison-Pony, Mont.	.....do.....	.....do.....	None.
170003	Wallace-Burke, Idaho	.....do.....	.....do.....	None.
170008	Marshall, Wash.-Lewiston, Idaho.	.....do.....	.....do.....	None.
170011	Arrow Sta. (n. o.)-Stites, Idaho.	.....do.....	.....do.....	Tacoma-Kalama, Wash.
171001	Tacoma, Wash.-Portland, Oreg.	.....do.....	June 30, 1914	None.
171005	Burnett-Wilkeson, Wash.	.....do.....	June 30, 1917	None.
171005	Spiketon-Wilkeson, Wash.	July 1, 1914	.....do.....	Spokane-Palmer, Jct.
171009	Spokane-Auburn, Wash.	July 1, 1910	.....do.....	(n. o.).
171012	Seattle-Tacoma, Wash.	.....do.....	.....do.....	Meeker Jct. (n. o.)-Tacoma.
171013	Pasco-Wallula, Wash.	.....do.....	.....do.....	Entire route.
171015	Pullman Jct. (n. o.)-Wash.-Genesee, Idaho.	.....do.....	.....do.....	None.
171016	Junction (n. o.)-Fairfax, Wash.	.....do.....	.....do.....	None.
171018	North Bend-Black River Jct. (n. o.)-Wash.	.....do.....	.....do.....	None.
171019	Hartford-Robe, Wash.	.....do.....	June 30, 1914	None.
171020	Sumas-Seattle, Wash.	.....do.....	June 30, 1917	None.
171021	Cheney-Adrian, Wash.	.....do.....	.....do.....	None.
171025	Altalia-Dayton, Wash.	.....do.....	.....do.....	None.
171029	Centralia-Gate, Wash.	.....do.....	.....do.....	None.
171030	Kanaskat (n. o.)-Kerriston, Wash.	.....do.....	.....do.....	None.
171032	Lakeview-Hoquiam, Wash.	.....do.....	.....do.....	None.
171035	Cle Elum-Roslyn, Wash.	.....do.....	.....do.....	None.
171037	Chehalis-South Bend, Wash.	.....do.....	.....do.....	None.
171037	Chehalis Jct. (n. o.)-South Bend, Wash.	July 1, 1914	June 30, 1917	None.
171043	Arlington-Darlington, Wash.	July 1, 1910	.....do.....	None.

Route No.	Terminal.	From—	To—	Land-grant portion.
171044	Bellingham-Wickersham, Wash.	.....do.....	.....do.....	None.
171045	Vancouver Jct. (n. o.)-Yacolt, Wash.	.....do.....	.....do.....	None.
171053	Palmer Jct. (n. o.)-Meeker Jct. (n. o.), Wash.	.....do.....	.....do.....	Entire route.
171054	Hoquiam-Moellips, Wash.	.....do.....	.....do.....	None.
171062	Sunnyside Jct. (n. o.)-Grandview, Wash.	.....do.....	.....do.....	None.
171064	Coulee City Jct. (n. o.)-Coulee City, Wash.	.....do.....	.....do.....	None.
171070	Lewiston Jct. (n. o.)-Pasco, Wash.	.....do.....	.....do.....	None.
171070	Riparia-Alnsworth Jct. (n. o.), Wash.	July 1, 1914	June 30, 1914	None.
173016	Hunts Jct. (n. o.), Wash.-Pendleton, Oreg.	July 1, 1910	.....do.....	None.

Plaintiff is the successor of the Northern Pacific Railroad Co., a corporation created by the act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route," 13 Stats., p. 365, and as such successor became entitled to receive and enjoy the grants of right of way and of the public lands made by the aforesaid act of Congress, and subject to the rights, duties, and obligations thereby imposed, including the express agreement made in section 11 thereof:

"That the said Northern Pacific Railroad, or any part thereof, shall be a post route and a military road, subject to the use
47 of the United States, for postal, military, naval, and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation."

By reason of its ownership of other parts of the Northern Pacific Railway system plaintiff is further subject to the land-grant conditions expressed in the act of Congress approved May 5, 1864, 13 Stats., p. 64, entitled "An act to make a grant of lands to the State of Minnesota to aid in the construction of a railroad from St. Paul to Lake Superior," wherein, and among other considerations moving the United States in the making of said grant, it was provided:

"Sec. 7. And be it further enacted, That the United States mail shall be transported over said road, under the direction of the Post Office Department, at such price as Congress may by law direct: Provided, That until such price is fixed by law the Postmaster General shall have the power to determine the same."

By reason of its ownership of other parts of the Northern Pacific Railway system plaintiff is further subject to the land-grant conditions expressed in the act of Congress approved March 3, 1865, 13 Stats., p. 526, entitled "An act extending the time for the completion of certain land-grant railroad in the States of Minnesota and Iowa, and for other purposes," wherein, and among other considerations moving the United States in the making of said grant, it was provided:

"Sec. 8. And be it further enacted, That the United States mail shall be transported on said road, under the direction of the Post Office Department, at such price as Congress may by law provide: Provided, That until such price is fixed by law the Postmaster General shall have the power to fix the rate of compensation."

Plaintiff is also subject to the terms, conditions, and requirements of section 214 of the act of Congress of June 8, 1872, entitled "An act to review, consolidate, and amend the statutes relating to the Post Office Department," 17 Stats., page 309, which provides as follows:

"Sec. 214. That all railway companies to which the United States have furnished aid by grant of lands, right of way, or otherwise, shall carry mails at such prices as Congress may by law provide, and, until such price is fixed by law, the Postmaster General may fix the rate of compensation."

In the construction of the above lines of railroads the plaintiff's predecessor was aided by grant of lands made thereto by the United

States on those portions indicated in the foregoing table and was not aided by any grant of lands or other property made thereto by the United States on the other portions of said routes.

II.

In 1867 the mails were being conveyed under agreements made between the railroad companies and the Post Office Department in pursuance of the act of Congress of 1845, and were thereafter carried up to the time of the passage of the act of 1873 under similar agreements. At the latter date a large majority of the railroad postal routes carried the mails six days per week, so as to make six round trips per week, and did not carry mails on Sundays. A much smaller number of railroad postal routes carried mails one or more times each day in the week, so as to make not less than seven round trips per week, and these carried mails on Sundays.

After order No. 412 was promulgated and became effective, the service performed by plaintiff on the routes involved in its claim was on six days in the week on routes 139067, 141033, 141036, 141046, 141051, 161005, 161006, 161007, 161017, 161025, 161030, 161036, 161041, 163003, 163004, 163007, 163013, 163020, 163022, (171019, 3 t. a. w.), 171035, 171043, 171062, the annual rate of pay on which was \$74,732.34, and seven days in the week on routes 141001, 141007, 141008, 141011, 441035, 141042, 141061, 161013, 161016, 163002, 163008, 163009, 163011, 163012, 163014, 163017, 170003, 170008, 170011, 171001, 171005, 171009, 171012, 171013, 171015, 171016, 171018, 171020, 171021, 171025, 171029, 171030, 171032, 171037, 171044, 171045, 171053, 171054, 171064, 171070, and 173016, the annual rate of pay on which was \$851,710.28.

After the enactment of the act of 1873 the mails were continued to be carried over railroad postal routes under agreements between the Post Office Department and the railroad companies concerned, and were being so carried at the date of order No. 412, June 7, 1907. At the date of the above order the relative proportion of seven and six days' carriage of mails had changed, and over a majority of the railroad postal routes mails were being carried every day in the week. The relative aggregate pay therefor had also changed, and the railroad postal routes performing service every day in the week represented a great preponderance in miles of routes and pay for service over those performing six days in the week.

III.

For a long time previous to 1867 mails were carried by railroad companies under separate contracts between the respective companies and the Post Office Department under authority of the acts of Congress referred to by the Postmaster General in his report for 1867, namely, those approved July 7, 1838, 5 Stat., 283; January 25, 1839, 5 Stat., 314; and March 3, 1845, 5 Stat., 732. The last-named act provided that to insure, as far as may be practicable, an equal and

just rate of compensation, according to the service performed, among the several railroad companies in the United States for the transportation of the mail, it shall be the duty of the Postmaster General to arrange and divide the railroad routes, including those in which the service is partly by railroad and partly by steamboat, into three classes, according to the size of the mails, the speed with which they are conveyed, and the importance of the service; and it shall be lawful for him to contract for conveying the mail with any such railroad company either with or without advertising for such contract. Maximum rates were fixed for service by the three classes, respectively, and the Postmaster General was authorized, in case he should not be able to conclude a contract for carrying the mail on any of

49 such railroad routes at a compensation not exceeding the maximum rates or for what he might deem a reasonable and fair compensation for the service to be performed, to separate the letter mail from the residue of the mail and to contract, either with or without advertising, for conveying the letter mail over such route by horse, express, or otherwise at the greatest speed that can reasonably be obtained, and also to contract for carrying over such route the residue of the mail, in wagons or otherwise, at a slower rate of speed.

With reference to the ascertainment of the "size of the mails" in order to make the classification authorized by the last-named act, the above-mentioned report states as follows:

"In order to make such an arrangement and classification of railroad routes as the act last mentioned contemplates, there is an obvious necessity for accurate and reliable information as to the 'size of the mails' they severally convey. Yet, until recently, no measures were ever taken to procure from any considerable proportion of the roads in the service of the department statements of the amounts of mail matter conveyed by them, respectively. In February and March last, however, a 'railroad weight circular' (a copy of which is hereto annexed) was issued and addressed to the proprietors of each railroad route, requesting them to 'weigh all the through mails and way mails' conveyed in both directions to and from every station for thirty consecutive working days, commencing on all roads east of the Rocky Mountains on the 1st and on all roads west on the 15th of April, 1867, and report the results to the department in a prescribed tabular form annexed to the circular, and to return also a description of the accommodations provided for mails and agents, with the dimensions, fixtures, and furniture of the car or apartment allotted to their use, and a statement of the number of trips per week in each direction.

* * * * *

"No general systematic revision and readjustment of these rates, based upon the returns received, has yet been attempted, but in a number of cases of disagreement between the department and railroad companies the returns have been used as a guide to a proper settlement of the dispute; and, as the terms of existing contracts expire and it becomes necessary to enter into new engagements, it is expected that such changes will from time to time be made as will

eventuate ultimately in the nearest practicable approach to a perfect classification of railroad routes and graduation of their pay according to the comparative value and importance of the service they perform."

The result furnished data for each route respecting the whole weights of mails carried in each direction, the total weight and the average weight carried the whole distance for the 30 consecutive working days, and the average weight carried the whole distance per day, ascertained by dividing such average total weight by 30, the size of mail car or apartment, and the number of trips performed per week.

In the years 1868, 1869, 1870, 1871, and 1872 revisions and readjustments of the rates of pay on railroad routes were made under the terms of the law of 1845 according to classifications based upon the returns of the weight of the mails conveyed and the accommodations provided for the mails and the agents of the department, 50 ascertained in the manner above stated. (See Reports of Postmaster General, 1868, p. 10, Table E, pp. 66, 67; 1869, pp. 10, 11, Table F, pp. 86, 87; 1870, pp. 10, 11, Table E, pp. 82, 83; 1871, p. x, Table E, pp. 48, 49; 1872, pp. 10, 11, Table E, pp. 100, 101.)

In the reports of the Postmaster General for the years 1869, 1870, and 1871 he called attention to complaints on the part of railroad companies to the inadequacy of compensation for carrying the mails, and in his report of 1870 it was stated that many of them have refused and still refuse to enter into contracts with the department, alleging that they would not bind themselves by a permanent arrangement at the present prices, and that, as a consequence, on many of the important roads the mails were carried as suited the convenience of the companies.

In the revision and consolidation of the statutes relating to the Post Office Department in 1872, 17 Stat. L., 309, certain provisions of the law of 1845 were changed.

The following year Congress passed the act of March 3, 1873, 17 Stat. L., 558, which is set out in the appendix to these findings.

A part of the act of 1873 was embodied in Revised Statutes as section 4002.

Prior to July 1, 1876, the weighing was done by the railroad companies transporting the mails, as above set forth. Subsequent to that time, by virtue of an act of Congress approved March 3, 1875, the weighing was done by Government agents under the direction of the Postmaster General. (See Appendix.)

IV.

Subsequent to the act of 1873 the Postmaster General, for the purpose of putting said act into effect, adopted the division of the United States, theretofore made into four sections, and had the mails weighed and the annual compensation for a term of four years fixed for all railroad routes in one section each year.

Before the compensation was fixed for any route the Postmaster General secured from the company performing the service an agreement in the form following:

"The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service."

After the weighing of the mails was completed and the compensation for the transportation thereof was fixed for the term the Postmaster General caused to be sent to each railroad company a notice in the form following:

"The compensation for the transportation of mails on route No. —, between — and —, has been fixed from July 1, 18—, to June 30, 18—, under act of March 3, 1873, upon returns showing the amount and character of the service for 30 successive working days, commencing —, 18—, at the rate of \$— per annum, being \$— per mile for — miles.

"This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week.

51 After the passage of said act of March 3, 1873, whereby the weighings were required to be made by employees of the department under instructions of the Postmaster General as above stated, the mails were weighed for 30 successive days, exclusive of Sundays, on routes not carrying mails on Sundays, and on 35 successive days, inclusive of Sundays, on routes carrying mails on Sundays, the Sunday weights being reported with the Monday weighings. The totals of the weighings in each class were used as a dividend, and in both classes 30 was used as a divisor. The quotient so obtained was treated as the average weight of mails per day carried.

From and after 1873 and until order No. 412 became effective, it was the practice of the Postmaster General, when computing the compensation payable to railroad carriers for service to be performed in transporting the mails over the several routes, to apply to the quotient obtained as above set forth, or by the act of 1905 which increased the minimum weighing days, the maximum rate allowed by statute, except in the cases of certain routes where pay was fixed without weighing, at the lowest maximum rate specified in the current law; "lap service" routes, being cases where two different routes coincide in part over the same line of railway and the pay is adjusted on a reduced sliding scale (P. L. & R., 1913, sec. 1325), "blue tag" routes over which periodical matter is transported in sacks marked with a blue tag, in fast freight trains, at less than maximum mail rates; and "equalization rates" where competition on basis of shorter mileage occurs between carriers, and the elder road possessed of the longer mileage and the mail contract is encouraged to retain the route, but at compensation based on the lesser mileage of the junior and shorter line.

V.

The acts of Congress approved July 12, 1876, and June 17, 1878 (see appendix), each prescribed reductions in the rates of pay to railroad companies for the transportation of the mails.

Said act of July 12, 1876, provided that land-grant roads shall receive only 80 per cent of the compensation authorized to be paid nonland-grant roads.

In administering the provisions of said acts of 1876 and 1878, and in making the reductions therein specified, the Postmaster General started with the maximum rates of pay allowed by the act of 1873, and the pro rata maxima prescribed by the regulations of the department for intermediate weights, and reduced the rates in accordance with said acts. The maximum rates taken in connection with the averages, found as stated, and the mileage involved, furnished the amount of the annual compensation.

VI.

In his report for the fiscal year ending June 30, 1884, the Postmaster General refers to the matter of "railroad rates," as embodied in the report of the Second Assistant Postmaster General, to which he called careful attention, and adds that "It is important that the rates paid should be arrived at by some equitable method." He says that in the 50 years intervening between 1834 and 1884 "legislation has touched this subject but four times"—in 1838, 1839, 1845, and 1873; that while the system of 1873 was an improvement on what went before, it was "still objectionable," "since it undertakes to pay for weight chiefly," and that the pay per ton per mile ranged from 8 to 96 cents. He recommended the passage of a proposed bill for the readjustment of compensation for the transportation of the mails on railroad routes.

Following this report, said bill was introduced in and favorably reported by the committees of both the House and Senate of the Forty-eighth Congress, but no action was taken on said bills by either House of Congress.

Subsequently the same bills were reintroduced in the Forty-ninth Congress, but no action was taken by the House on said bills.

In September, 1884, the then Postmaster General prepared and issued an order in the form following:

"Order No. 44.—Hereafter, when the weight of mails is taken on the railroad routes performing service seven days per week, the whole number of days the mails are weighed, whether thirty or thirty-five, shall be used as a divisor for obtaining the average weight per day."

Thereafter, October 22, 1884, the succeeding Postmaster General submitted the question to the Attorney General for his opinion as to whether the method adopted was a proper construction of the act of March 3, 1873, as follows:

"SIR: The act of March 3, 1873, 17 Stat. L., p. 558, regulating the pay for carrying the mails on railroad routes, provides:

"That the pay per mile per annum shall not exceed the following rates, namely:

"On routes carrying their whole length an average weight of mails per day of 200 pounds, \$50; 500 pounds, \$75; 1,000 pounds, \$100; 1,500 pounds, \$125; 2,000 pounds, \$150; 3,500 pounds, \$175, etc. * * *

"The average weight to be ascertained in every case by the actual weighing of the mails for such a number of successive working days, not less than thirty.' * * *

"Upon a large number of the railroad routes mails are carried on

six days each week—that is, no mail is carried on Sunday. On others they are carried on every day in the year.

"It has been the practice since 1873 in arriving at the average weight of mails per day on these classes of service to treat the 'successive working days' as being composed of six secular or working days in the week, which is explained in the following illustrations:

"Two routes, Nos. 1 and 2, over each of which 313 tons of mail are carried annually.

"On route No. 1 mails are carried twice daily, except Sunday, six days per week, and are weighed 30 successive working days, covering usually a period of 35 days. The result is divided by 30, and an average weight of mails per day of 2,000 is obtained.

Transportation per mile of road per annum.....	miles..	1,252
Weight per mile of road per annum.....	tons..	313
Pay per ton per mile of road per annum.....	cents..	47.92
Pay per mile run of road per annum.....	do...	11.09
Rate of pay allowed per mile per annum.....		\$150

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"On route No. 2 mails are carried twice daily, seven days per week and weighed for 30 successive working-days and for the intervening Sundays, the weight on the Sundays being treated as if carried on Mondays, the weighing as before covering usually a period of 35 days. The result is divided by 30 and an average weight of mails per day of 2,000 pounds is obtained.

Transportation per mile of road per annum.....	miles..	1,460
Weight per mile of road per annum.....	tons..	313
Pay per ton per mile of road per annum.....	cents..	47.92
Pay per mile run	do...	10.02
Rate of pay allowed per mile per annum.....		\$150

"I have thought it necessary to give the foregoing illustrations in order that the practice of this department under the law cited may readily appear, and I will thank you to advise me whether that practice is in compliance with or in violation of the statute.

"If not in conformity with the law, will you please indicate the correct method by which the average weight per day should be obtained and the compensation adjusted thereon?

"Very respectfully,

"FRANK HATTON,

"Postmaster General.

"Hon. B. H. Brewster, Attorney General, Department of Justice."

In reply, the Acting Attorney General gave his opinion as below:

DEPARTMENT OF JUSTICE,
"WASHINGTON, October 31, 1884.

"The Postmaster General.

SIR: I have considered your communication of the 22nd instant requesting to know whether the construction placed by the Post Office Department on section 4002, subsection 2, prescribing the mode in

which the average of the weight of mails transported on railroad routes shall be ascertained is correct, and am of the opinion that that construction is correct, and that a departure from it would defeat the intention of the law and cause no little embarrassment.

"I have the honor to be, your obedient servant,

"WM. A. MAURY,
"Acting Attorney General."

This order No. 44 was thereafter, in January, 1885, revoked, and no weighings having occurred in the meantime, it never had any practical operation or result.

VII.

What is called "A documentary history of the Railway Mail Service from its origin in 1834 to the present time," prepared by the general superintendent of the Railway Mail Service, was transmitted to the Senate with a letter by the Postmaster General on January 21, 1885, in compliance with a resolution of the Senate, and, among others, said document contains the following statements:

"Some little controversy at one time existed as to the justice of the present methods of obtaining the average daily weight to be taken as a basis for determining the annual pay, but a little examination made it clear that no other way of proceeding could be so just as that now in vogue.

* * * * *

"The present rule is on those roads carrying the mails six times a week to weigh the mails on 30 consecutive days on which the mails are carried, which would cover a period of 35 days; dividing the aggregate 30 weighings by 30 will give the daily average. On those roads carrying the mails seven times per week the weighing is done for 35 consecutive days (including Sundays) and the aggregate divided by 30 for a basis of pay.

"It is evident that the period during which the weighing is continued covers, in both cases, all the mails carried for 35 days. If, in the second case, we should take our basis from an average obtained by dividing the aggregate weight by 35 we should commit the absurdity of putting a premium upon inefficiency, for evidently if the Sunday train were cut off we should virtually have the same mails less frequently carried, and, therefore, with a higher daily average, and, therefore, a higher pay basis than in the case where the seventh train was run and the greater accommodation rendered.

"The present method gives no additional pay for the additional seventh train, but the other method would cause a reduction on account of better service, and practically would operate as a fine on all those roads carrying the mails daily and including Sundays."

Said document was printed as Senate Executive Document 40, Forty-eighth Congress, second session.

VIII.

The act of March 3, 1905, 33 Stat. L., 1088, changes the minimum weighing period provided by the act of 1873 so as to require the in-

clusion of at least 90 instead of at least 30 successive working days. (See Appendix.)

The post-office appropriation bill for the fiscal year ending June 30, 1906, as reported to the House of Representatives by its Committee on Post Offices and Post Roads, contained the following:

"For inland transportation by railroad routes * * * \$40,900,-000: Provided, That hereafter before making the readjustment of pay for the transportation of mails on railroad routes, the Postmaster General shall have the mails on such routes weighed and the average weight per day ascertained for a period of not less than three consecutive months."

Said proviso was stricken out in the House of Representatives and the following was adopted in lieu thereof and became a part of the act approved March 3, 1905:

"Provided, That hereafter before making the readjustment of pay for transportation of mails on railroad routes, the average weight shall be ascertained by actual weighing of the mails for such a number of successive working days, not less than ninety, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct." Cong. Rec., 58th Cong., 3d sess., p. 1744.

In the administration of said act the Postmaster General made no change in the said system of weighing the mails theretofore adopted, except to weigh the mails for a period of 105 days instead of for a period of 35 days, and to use as a divisor 90 instead of 30 to ascertain the average weight, until the issuance of order No. 412, set forth in Finding X.

IX.

At the second session of the Fifty-ninth Congress the Committee on Postoffices and Post Roads of the House of Representatives reported a bill making appropriations for expenses of the Post Office Department for the fiscal year ending June 30, 1908, and the same became law on March 2, 1907. As reported by said committee said bill contained among other things, the following provision:

"Provided, That hereafter the average weight per day be ascertained, in every case, by the actual weighing of the mails for such a number of successive days, not less than one hundred and five, at such times and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

Said bill was accompanied by a report of said committee which fully explained the construction and practice, under said previous act of Congress, in the weighing of the mails, and that the purpose of said provision in the bill was to change the method of ascertaining the daily average weights by requiring that all of the days in the weighing period be included in the divisor. There was extensive debate upon said provision in the Committee of the Whole upon the state of the Union, in which the chairman of

said committee and other Members of the House stated and discussed the history, hereinbefore narrated, of the existing practice of including the secular days only in the divisor of weights.

Before action was had on said provision, a motion was made to amend the bill by inserting the following proviso, referring to the sum appropriated for the Railway Mail Service:

"Provided, That no part of this sum shall be expended in payment for transportation of the mails by railroad routes where the average weight of mails per day has been computed by the use of a divisor less than the whole number of days such mails have been weighed."

A point of order was made against this amendment on the ground that it changed existing law, and the chair sustained the point, observing:

"The existing law has received a construction by the officers charged with the duty of administering it, and that construction the chair feels bound to follow. The proposed amendment changes existing law as construed by the proper officer by changing the divisor. * * * It has been held further that while limitation may provide that a part of an appropriation shall not be used except in a certain way, yet the restriction of executive discretion may not go to the extent of new duties. And the limitation on the discretion exercised under the law by a bureau of the Government is a change of existing law."

56 Upon appeal from the decision of the chair, its ruling was sustained.

Another amendment was then offered, as follows:

Provided, That no part of this sum shall be expended in payment for transportation of the mails by railroad routes where the average weight of mails per day has been computed by the use of a divisor less than the whole number of working days such mails have been weighed; and

"Provided further, That the words 'working days' shall be construed to mean days upon which work in the transportation of the mails by railroad routes is performed."

This amendment was also rejected after debate, and said provision reported by the Committee on Post Offices and Post Roads was then stricken out. Thereafter an amendment was offered, as below, by the chairman of said committee, and was adopted by the House:

"The Postmaster General is hereby authorized and directed to readjust the compensation to be paid from and after the first day of July, nineteen hundred and seven, for the transportation of mail on railroad routes carrying their whole length an average weight of mail per day of upward of five thousand pounds by making the following changes in the present rates per mile per annum for the transportation of mail on such routes, and hereafter the rates on such routes shall be as follows:

"On routes carrying their whole length an average weight of mail per day of more than five thousand pounds and less than forty-eight thousand pounds the rate shall be five per centum less than the

present rates on all weight carried in excess of five thousand pounds, and on routes carrying their whole length an average weight of mail per day of more than forty-eight thousand pounds the rates shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds up to forty-eight thousand pounds; and for each additional two thousand pounds in excess of forty-eight thousand pounds at the rate of nineteen dollars and twenty-four cents upon all roads other than land-grant roads, and upon all land-grant roads the rate shall be seventeen dollars and ten cents for each two thousand pounds carried in excess of said forty-eight thousand pounds."

As so amended the bill was passed by the House and went to the Senate.

When it had been reported by the Senate Committee on Post Offices and Post Roads an amendment was offered in the identical language of said amendment first rejected by the House. Said amendment was not debated nor explained but was adopted by the Senate. The bill was then sent to a conference of the two Houses. In the conference objection was made on the part of the House of Representatives to said Senate amendment, and the committees of conference in their reports recommended that the Senate recede from the same, which it did, and the two Houses adopted said reports and passed the bill with said amendment stricken out, but containing the provision last above quoted.

57 When offering said provision in above form, and as it was enacted into law, the chairman of the Committee on Post Offices and Post Roads pointed out that the then pending bill had provided four distinct reductions (including the three carried in the provision hereinbefore set out) in the compensation of railway mail carriers, and he explained that two of said four reductions, viz, that carried by the amendment he was offering, and one other, relative to pay for Postoffice cars, had been selected as those which the House apparently preferred to adopt.

X.

Thereafter the Postmaster General on March 2, 1907, and June 7, 1907, respectively, issued orders as follows

"Order No. 165.—That when the weight of mail is taken on railroad routes the whole number of days the mails are weighed shall be used as a divisor for obtaining the average weight per day.

"Order N. 412.—Ordered, that Order 165, dated March 2, 1907, be, and the same is hereby, amended to read as follows:

"That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day."

In accordance with the last-named order for all weighings and readjustments made subsequent to its promulgation, the Postmaster General weighed the mails on railroad routes for 105 days and divided the aggregate weights by 105, and the readjustments were

made on the average weight per day so computed, and the plaintiff company was paid accordingly.

Thereafter the Postmaster General submitted to the Attorney General the order No. 412 for an opinion as to its legality, and the Attorney General, under date of September 27, 1907, rendered an opinion sustaining the legality of said order.

XI.

The quadrennial term for which readjustment had been made on the routes of plaintiff numbered 139067, 141001, 141007, 141008, 141011, 141033, 141035, 141036, 141042, 141046, 141051, and 141061, operated on June 30, 1907, as set forth in Finding I, expired by limitation on that day. The Postmaster General on February 12, 1907, notified the plaintiff of direction given to weigh the mails on such routes. Accompanying said notice there was sent to the plaintiff a Post Office Department distance circular known as Form No. 2504, which it was requested to fill out with certain specific information called for thereon and to return the completed circular to the Second Assistant Postmaster General. As transmitted to the plaintiff the form contained an agreement clause to be executed by a principal officer of the company, as follows:

"The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service."

58 The said notice accompanying the distance circular informed the plaintiff that the General Superintendent, Railway Mail Service, had been directed to weigh the mails on its routes commencing February 19, 1907, "for the purpose of obtaining data upon which the department may adjust the pay for mail service on the route (in accordance with the several acts of Congress governing the same), from July 1, 1907," etc.

Thereafter the plaintiff, on June 21, 1907, returned to the Second Assistant Postmaster General the executed distance circular with the agreement clause above noted signed, but with the following exception attached thereto:

"Exception taken to order No. 165, issued by the Postmaster General March 2, 1907, and order No. 412, issued June 7, 1907."

Accompanying said executed distance circulars was a letter dated June 18, 1907, which, after reciting the return of the distance circulars, read as follows:

"Without undertaking to materially change the form of the contract printed at the top of the second page of each circular and signed by our general manager, we have nevertheless taken the liberty of adding thereto a formal exception to both order No. 165, issued by the Postmaster General on March 2, 1907, and order No. 412, issued by the Postmaster General on June 7, 1907. The contract in question obligates our company 'to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail pay,' and we therefore beg leave to

now formally advise, in submitting these distance circulars, that the service involved is accepted, and our company agrees to perform same, with the proviso that by thus subscribing and delivering these circulars to the department our company does not agree to submit to any but lawful regulations by the department, and on this point our company does not concede the power of the Postmaster General, through an order or through any other act of the Post Office Department, to provide for changing the method of ascertaining the daily average weight of the mails carried over the routes named on the distance circulars herewith, unless authorized by proper congressional enactment. In the view of our company there is no authority whatever in existing legislation for the aforesaid orders Nos. 165 and 412, issued March 2, 1907, and June 7, 1907, respectively.

"The mails will be transported by our company, of course, as required by the public necessity, pending settlement of the rights of our company and of the United States in the question involved, i. e., the matter of ascertaining the average daily weights, with the consequent annual compensation for service performed over the routes covered by the distance circulars herewith. In addition to thus assuring the transportation of the mails as heretofore, by way of adequately fulfilling the public necessities, we now record our company's formal refusal to accept the proposed method of ascertaining the average daily weights of mails carried and fixing the annual rates of pay as provided by the orders of the Postmaster General heretofore described, and our company also reserves all of its rights in the premises to hereafter take such action as may be found requisite toward determining the legal method of ascertaining the daily average weights of mails carried over each route and
59 the correct and legal rates of compensation for the services so rendered, in accord with the existing legislation which controls the matters involved.

"We trust that appropriate adjustment in this connection may be effected without further material difficulty."

The Second Assistant Postmaster General addressed a letter to the plaintiff on October 3, 1907, as follows:

"This office is in receipt of the distance circular for route No. 141001, from St. Paul, Minn., to Fargo, N. Dak., filed by you for the term beginning July 1, 1907, and ending June 30, 1911, for railroad mail service by your company.

"Note is taken of the modification made by you in the agreement clause in which you except order No. 165, issued by the Postmaster General March 2, 1907, and order No. 412, issued by the Postmaster General June 7, 1907, and enter protest against other rules, regulations, or requirements of the department with respect to the performance of service. In regard to this, I have to advise you that the department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law or regulation, and it must be understood that, in the performance of service, from the beginning of the contract term above named, and during the continuance of such performance of service, your company will be subject, as in the past, to all the postal

laws and regulations which are now or may become applicable during the term to this service."

Like notices and distance circulars bearing the same date for the other routes set forth in Finding I for the term of July 1, 1907, to June 30, 1911, were sent to the plaintiff by the Postmaster General, and the said distance circulars were returned executed by the plaintiff, as in the case for route 141001, and the same reply to the protest was made by the department in each case as above set forth.

The Postmaster General caused the mails to be weighed on each of said routes for 105 days, then caused the average daily weight carried thereon to be computed as provided in said order No. 412, and on the basis of the weight so ascertained caused the maximum statutory rate to be calculated; and thereafter he issued orders stating such amounts and rates as the compensation for the service. The order for route 141001 was as follows:

"Minn., St. Paul, Minn., & Fargo, N. Dak., 250.34 miles, 30.14 t. a. w., Northern Pacific Railway Company a. d. w. 45,700 lbs.

"From July 1, 1907, to June 30, 1911, pay the Northern Pacific Railway Company, quarterly, for the transportation of the mails between St. Paul, Minn., and Fargo, N. Dak., at the rate of \$129,430.87 per annum, being \$466.89 per mile for 10.44 miles St. Paul to Minneapolis, land grant; \$583.62 per mile for 73.77 miles, Minneapolis to Watab; \$466.89 per mile for 23.56 miles, Watab to Little Falls, land grant; \$583.62 per mile for 33.74 miles, Little Falls to Staples; \$466.89 per mile for 108.83 miles, residue, land grant, and for R. P. O. car service at the rate of \$25,346.92 per annum, being \$101.25 per mile for 250.34 miles, St. Paul to Fargo, for 1½ lines 60-ft., ½ √ line 50-ft., and 1 line 40-ft. cars.

"This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week."

The Second Assistant Postmaster General on November 19, 1907, sent to the plaintiff a notice of such readjustment of pay, as follows:

"The compensation for the transportation of mails, etc., on route No. 141001, between St. Paul, Minn., and Fargo, N. Dak., has been fixed from July 1, 1907, to June 30, 1911 (unless otherwise ordered), under acts of March 3, 1873, July 12, 1876, June 17, 1878, March 3, 1905, and March 2, 1907, upon returns showing the amount and character of the service for a number of successive working days, not less than 90, commencing February 20, 1907, at the rate of \$129,430.87 per annum, being \$466.89 per mile for 10.44 miles, St. Paul to Minneapolis, land grant; \$583.62 per mile for 73.77 miles, Minneapolis to Watab; \$466.89 per mile for 23.56 miles, Watab to Little Falls, land grant; \$583.62 per mile for 33.74 miles, Little Falls to Staples; \$466.89 per mile for 108.83 miles, residue, land grant, and pay is allowed for use of R. P. O. cars from July 1, 1907, to June 30, 1911, at the rate of \$25,346.92 per annum, being \$101.25 per mile for 250.34 miles, St. Paul to Fargo, for 1½ lines 60-ft., ½ line 50-ft., and 1 line 40-ft. cars.

"Subject to further readjustment in accordance with section 1272, P. L. & R., where lap service is involved and not so readjusted.

"This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week."

Before the term for which readjustment had been made on the above-named routes, as hereinabove set forth, had expired, the Second Assistant Postmaster General, on February 17, 1911, notified the plaintiff of direction given to weigh the mails on such routes and also sent distance circulars as theretofore for the purpose of making readjustments for the new term beginning July 1, 1911. Said notification was in the same language as that which had been given theretofore, with the exception that it included the following:

"In connection with the readjustment to be made on this weighing of the mails, your attention is called to the Postmaster General's Order No. 412, of June 7, 1907, which reads as follows:

"That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day."

Before the contract term began the Second Assistant Postmaster General, on June 27, 1911, addressed a letter to plaintiff calling attention to the fact that the distance circulars had not been received for the new term, concluding with the following: "In the meantime the service will continue subject as in the past to the postal laws and regulations applicable thereto."

The plaintiff returned the distance circulars on July 5, 1911, with the agreement clause signed, but with the following exception attached thereto:

"but takes exception to order No. 412, issued by the Postmaster General, June 7, 1907."

Accompanying said distance circulars was a letter of same date from plaintiff stating the return of the circulars and including the following statement:

"You will note that our vice president has signed these circulars to accept and perform mail service upon the conditions prescribed by the Postal Laws and Regulations, excepting that of order 412, issued by the Postmaster General June 7, 1907."

The Second Assistant Postmaster General on July 12, 1911, replied to the plaintiff as to this protest in the same language as was done in 1907, with the exception that in the statement that the company would be subject as in the past to all postal laws and regulations there was included "and orders of the Postmaster General."

Thereafter, on July 14, 1911, the plaintiff addressed a letter to the Second Assistant Postmaster General in reply as follows:

"In reply thereto, we call attention that the distance circulars referred to have been properly executed by Mr. J. M. Hannaford, second vice president and general manager of the Northern Pacific Railway Co., and constitutes a contract with the United States under which our company may be expected to perform the service, and transportation of mails over our lines must be in accordance with the terms stated in said circulars."

On July 15, 1911, the Second Assistant Postmaster General replied as follows:

* * * * *

"You state that the distance circulars have been properly executed by the second vice president and general manager of your company 'and constitutes a contract with the United States under which our company may be expected to perform the service, and transportation of mails over our lines must be in accordance with the terms stated in said circulars.' In reply to this I have to inform you that the filing of a distance circular with the agreement clause modified, as was done in this case, does not constitute a contract with the United States, and that notwithstanding your statement, you are again advised that the department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law, regulation, or order of the Postmaster General. Respecting the terms under which the service on the route is being and will continue to be performed, it must be understood that your company will be subject, as in the past, to all the postal laws, regulations, and orders of the Postmaster General which are now or may become applicable during the term to this service."

On July 17, 1911, the plaintiff wrote the Second Assistant Postmaster General, acknowledging receipt of letter of July 15 and stated as follows:

"* * * You advise us that the filing of these distance circulars with the agreement clause modified 'does not constitute a contract between the United States and the carrier, and inasmuch as the distance circular filed by this company constitutes the only
62 contract to which it has assented, we would be pleased to receive your advice as to the conditions under which this mail is to be transported for the quadrennial period ending June 30, 1915, it being particularly understood that this company does not and will not consent to the transportation of the mail under order No. 412.

"It is perfectly true that this company is under obligation to transport mail over that portion of its road aided by a grant of land, subject to the Postal Laws and Regulations, but such law must not be confiscatory in its terms, and such regulations must at least be in accordance with law and not in contravention thereof. This company claims that order 412 was one beyond the power of the Postmaster General to make, and it does not care to enter into any contract for transportation of the mail for the quadrennial period ending June 30, 1915, except upon the distinct understanding that it does not agree to the terms of the order."

On July 19, 1911, the Second Assistant Postmaster General acknowledged receipt of plaintiff's letter and replied thereto as follows:

"Your objection appears to be directed entirely toward the use of what is known as the new divisor required to be used by the department by Postmaster General's Order No. 412 issued June 7, 1907.

The legality of this order has been formally passed upon by the Attorney General of the United States and sustained by him. The method of adjusting pay in accordance with it has since been the uniform practice of the department and has been applied to all weighings since its promulgation. It is therefore the settled practice of the department, to which no exception can be made.

"The position of the department, therefore, is that the compensation hereafter to be fixed by the adjustment orders in accordance with Order No. 412 is the maximum which may be allowed by the Postmaster General under the laws and regulations, and that for service performed since July 1 last and in the future the department can not allow a higher rate. The department, therefore, can not make any agreement with your company which will recognize the validity of your contention that Order No. 412 is without authority of law, and if your company performs the service under these conditions our position is that it can not recover more than the rate of compensation named in the adjustment orders, and that for service performed no other or further compensation will be paid."

Thereafter the mails were weighed, the average daily weight ascertained by the application of Order No. 412, the pay stated, and the plaintiff notified, as hereinbefore recited, for the preceding term.

Before the term for which readjustment on the routes hereinbefore mentioned had expired the Second Assistant Postmaster General on February 10, 1915, notified plaintiff in the same manner as he had done before of the purpose to weigh the mails and sent plaintiff the distance circulars to be executed and returned, as theretofore, for the term beginning July 1, 1915. Said notice of the weighing and the agreement clause on the distance circular were in the forms, respectively, used in 1911.

63 Plaintiff, on June 21, 1915, returned said distance circulars with the agreement clause signed, but with the addition of the following thereto:

"except Postmaster General's Order No. 412, issued June 7, 1907, and Postal Regulations, section 1317, paragraph 10. This company can not accept as full compensation payment based upon the daily average weight ascertained under aforesaid order and regulation and claims right to payment on the daily average volume of business ascertained under method provided by law in effect prior to the issuance of said order."

To this exception the Second Assistant Postmaster General, on June 28, 1915, replied, after acknowledging receipt of the circulars and noting plaintiff's modification, as follows:

"In regard to the modifications made by you in the distance circulars I have to inform you that, notwithstanding the same, the Post Office Department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law, regulation, or order of the Postmaster General; and it must be understood that in the performance of service, from the beginning of the contract term above named and during the continuance of such

performance of service, your company will be subject, as in the past, to all the postal laws, regulations, and orders of the Postmaster General which are now or may become applicable during the term to this service; and that the amount of compensation for the transportation of the mails which will be fixed by the Postmaster General in accordance with the terms of paragraph 10, section 1317, Postal Laws and Regulations, 1913 (Order No. 412), is all the compensation that will be paid for such service on the routes named."

The mails were weighed, the average daily weights ascertained by the application of Order No. 412, the rates of pay stated therefor by the Postmaster General, and the plaintiff notified thereof, in the same manner as theretofore.

Thereafter on June 30, 1913, the Second Assistant Postmaster General sent plaintiff a letter as follows:

"At the time the notice of direction given to weigh the mails on your company's route No. 141001, from St. Paul, Minn., to Fargo, N. Dak., for the purpose of adjusting pay thereon was communicated to your company, you were informed of the intention of the department to apply Postmaster General's Order No. 412 in making such adjustment. In this connection you are informed that the compensation for carrying mails heretofore fixed, or which may be hereafter fixed by the orders of the Postmaster General on the above-named route, in which adjustment the said Order No. 412 has been or will be followed, is all that will be paid for the service on the route. Continuance of service by your company must only be with the understanding that such compensation as may be or which has been obtained by applying Order No. 412 shall be full payment for all services rendered by you."

64 The quadrennial term for which readjustments had been made on the routes of plaintiff operated on June 30, 1910, as set forth in finding I, expired by limitation on that day. The Postmaster General on February 4, 1910, notified the plaintiff of direction given to weigh the mails on such routes. Accompanying said notice there was sent to the plaintiff a Post Office Department distance circular, known as Form No. 3504, which it was requested to fill out with certain specific information called for thereon and to return the completed circular to the Second Assistant Postmaster General. As transmitted to the plaintiff the form contained an agreement clause to be executed by a principal officer of the company, as follows:

"The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service."

Said notice accompanying the distance circular informed plaintiff that the General Superintendent, Railway Mail Service, had been directed to weigh the mails on its routes commencing February 17, 1910, "for the purpose of obtaining data upon which the department may adjust the pay for mail service on the route (in accordance with the several acts of Congress governing the same), from July 1, 1910," etc. It further contained the following statement in connection with the readjustment:

"In connection with the readjustment to be made on this weighing of the mails, your attention is called to the Postmaster General's Order No. 412 of June 7, 1907, which reads as follows:

"That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day."

Before the contract term began the Second Assistant Postmaster General, on June 24, 1910, addressed a letter to plaintiff calling attention to the fact that distance circulars had not been received for the new term, concluding with the following: "In the meantime the service will continue subject, as in the past, to the postal laws and regulations applicable thereto."

Thereafter the plaintiff returned to the Second Assistant Postmaster General the executed distance circulars, accompanied by a letter of July 11, 1910, which were received at the department July 12, 1910, with the agreement clause above noted signed, but with the following exception noted thereto:

"Exception taken to order No. 165, issued by the Postmaster General March 2, 1907, and order No. 412, issued by the Postmaster General June 7, 1907."

The accompanying letter also referred to the protest.

The Second Assistant Postmaster General addressed a letter to plaintiff on July 29, 1910, replying to its protest. This letter, after acknowledging receipt of the distance circulars, is as follows:

"Note is taken of the modification made by your company in the agreement clause, in which it excepts order No. 165, issued by the Postmaster General March 2, 1907, and order No. 412, issued by the Postmaster General June 7, 1907. In regard to this I have to advise you that the department will not enter into contract with any railroad

65 company by which it may be excepted from the operation or effect of any postal law or regulation, and it must be understood that, in the performance of service, from the beginning of the contract term above named and during the continuance of such performance of service, your company will be subject, as in the past, to all the postal laws and regulations which are now or may become applicable during the term to this service."

Thereafter the mails were weighed, the average daily weights ascertained by the application of order No. 412, the pay stated by the Postmaster General, and the plaintiff notified thereof in the same manner as hereinbefore recited.

Before the term for which readjustment had been made on the routes last herein named had expired the Second Assistant Postmaster General, on February 9, 1914, notified the plaintiff of direction given to weigh the mails on such routes and also sent distance circulars as theretofore for the purpose of making readjustments for the new term beginning July 1, 1914. Said notification and distance circulars were in the same language as those which had been sent theretofore.

Thereafter plaintiff returned the distance circulars, which were received at the department June 29, 1914, accompanied by a letter dated June 26, 1914, with the agreement clause signed, but prefixed with the following:

"Exception to Postmaster General's Order No. 412, issued June 7, 1907, and Postal Regulations, section 1317, paragraph 10.

"This company can not accept as full compensation payment based

upon daily average weights ascertained under aforesaid order and regulations and claims right to payment on the daily average volume of business ascertained under method provided by law in effect prior to the issuance of said order."

The Second Assistant Postmaster General, on July 29, 1914, replied to the plaintiff as to this protest. After acknowledging receipt of the distance circulars and noting the exception, it continued as follows:

"In regard to the modifications made by you I have to inform you that, notwithstanding the same, the Post Office Department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law, regulation, or order of the Postmaster General; and it must be understood that in the performance of service, from the beginning of the contract term above named and during the continuance of such performance of service, your company will be subject, as in the past, to all the postal laws, regulations, and orders of the Postmaster General which are now or may become applicable during the term to this service; and that the amount of compensation for the transportation of the mails which will be fixed by the Postmaster General in accordance with the terms of order 412 is all the compensation that will be paid for such service on the routes named."

Thereafter the mails were weighed, the average daily weights ascertained by the application of Order No. 412, the pay stated by the Postmaster General, and the plaintiff notified as hereinbefore recited for the preceding term.

66

XII.

The plaintiff continued to carry the mails of the United States from and after the 1st day of July, 1907, 1910, 1911, 1914, and 1915, on its respective routes which it was operating on those dates, as hereinbefore set forth, and has been paid for the service at the rates of compensation stated by such orders.

XIII.

The act making appropriations for the service of the Post Office Department for the fiscal year ended June 30, 1909, as reported to the House by the committee, contained no reference to the matter of weighings of the mails or to the question of the divisor. While in the Committee of the Whole an amendment was offered providing in effect that not exceeding six-sevenths of the amount payable under the orders adjusting pay in the two contract sections to which order 412 had not been applied should be paid out of the appropriation thereby made until such adjustment should have been made in accordance with order 412, or until it should have been finally determined by law that the first or then existing adjustment was binding upon the Government, notwithstanding any error or wrong in the basis of such ascertainties. A point of order was raised on this in the House, and the Chairman of the Committee of the Whole overruled it, and the amendment was agreed to. The bill with the amendment was passed by the House and sent to the Senate. It was reported

from the Senate Committee on Post Offices and Post Roads to the Senate with a substitute amendment for the one passed by the House, which substitute amendment, among other things, provided that the whole number of days included in the weighing period shall be used as a divisor for obtaining the average daily weight. A point of order was raised on this in the Senate, and the President of the Senate overruled it, and then the amendment was agreed to. The bill with the amendment was passed by the Senate. A slight change was made by the conferees of the Senate and the House, and their agreement was reported to their respective bodies. The House, however, refused to adopt the Senate amendment, and the Senate receded, and the provision failed of enactment. In the discussion of the bill in the Senate the active member of the committee, in explaining the bill, stated that the provision was intended to crystallize into law the requirement that seven days instead of six shall be used as the divisor in determining the amount due the railroad companies, and the chairman of the committee in the House declared that the provision "makes permanent law what is now known as the divisor. It is now but a department official order, subject to change or repeal by any subsequent official in control of the department. By making it permanent law we avoid that possibility."

In the annual reports for the fiscal year 1907 and following years the Post Office Department stated its estimates of expenses for transportation by railroad routes, which estimates were calculated upon the application of the new divisor in so far as the same had been applied from year to year. These reports reached Congress through the usual channels of transmission. The report for 1907
67 stated that the railroad companies were dissatisfied with the order and had modified their distance circulars by excepting to it. Congress made the appropriations as submitted by the department. The reports for 1910 and succeeding years further stated that the railroad companies protested against the use of the new divisor, and that suits had been filed calling into question its validity. In submitting its estimates for appropriations for the years mentioned the department prepared them upon the basis of the application of order 412 in so far as it had been applied from year to year, and Congress made appropriations based thereon.

XIV.

The plaintiff company has received monthly or quarterly payments, based upon said computation and readjustments, at or about the end of each month or quarter's service, and the payments were received without objection or protest of any kind.

XV.

If instead of using a divisor of 105, there had been used a divisor of 90, and to the average thus found the maximum rates allowed by law be applied, the difference between the amount so resulting and what has been paid plaintiff to June 30, 1917, is \$704,871.63.

XVI.

Reference is made to the several reports of the Postmasters General for the years 1867 to 1914, inclusive; to Preliminary Report and Hearings relative to Railway Mail Pay before Joint Committee of Congress January, 1913, to April, 1914, pages 987, 1023, 1024; also to the acts of Congress appearing in the appendix to these findings.

Conclusion of Law.

Upon the foregoing findings of fact, the court decides, as a conclusion of law, that plaintiff is not entitled to recover, and its petition is accordingly dismissed. (See Opinion and Concurring Opinions filed herewith in cases 31227, 32812, and 32852.)

68

Appendix.

Act of 1873.

The act of March 3, 1873, 17 Stat. L., 558, appropriates for the service of the Post Office Department "out of any moneys in the Treasury arising from the revenues of said department, in conformity to the act of July second, eighteen hundred and thirty-six" (5 Stats., 80), "For inland mail transportation, fourteen million eight hundred and forty thousand and twenty dollars," and makes appropriations for messengers, route agents, mail-route messengers, local agents, letter carriers, etc., and then follows:

"For increase of compensation for the transportation of mails on railroad routes upon the condition and at the rates hereinafter mentioned, five hundred thousand dollars, or so much thereof as may be necessary: Provided, That the Postmaster General be, and he is hereby, authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned, to wit, that the mails shall be conveyed with due frequency and speed; that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and warmed, shall be provided for route agents to accompany and distribute the mails, and that the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; five hundred pounds, seventy-five dollars; one thousand pounds, one hundred dollars; one thousand five hundred pounds, one hundred and twenty-five dollars; two thousand pounds, one hundred and fifty dollars; three thousand five hundred pounds, one hundred and seventy-five dollars; five thousand pounds, two hundred dollars, and twenty-five dollars additional for every additional two thousand pounds, the average weight to be ascertained in every case by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and

verified in such form and manner as the Postmaster General may direct: Provided also, That in case any railroad company now furnishing railway post-office cars shall refuse to provide such cars, such company shall not be entitled to any increase of compensation under any provision of this act: Provided further, That additional pay may be allowed for every line comprising a daily trip each way of railway post-office cars, at a rate not exceeding twenty-five dollars per mile per annum for cars forty feet in length; and thirty dollars per mile per annum for forty-five feet cars; and forty dollars per mile per annum for fifty feet cars; and fifty dollars per mile per annum for fifty-five feet to sixty feet cars: And provided also, That the

69 length of cars required for such post-office railway-car service shall be determined by the Post Office Department, and all such cars shall be properly fitted up, furnished, warmed, and lighted for the accommodation of clerks to accompany and distribute the mails: And provided further, That so much of section two hundred and sixty-five of the act approved June eighth, eighteen hundred and seventy-two, entitled 'An act to revise, consolidate, and amend the statutes relating to the Post Office Department,' as provides that 'the Postmaster General may allow any railroad company with whom he may contract for the carrying of the United States mail, and who furnish railway post-office cars for the transportation of the mail, such additional compensation beyond that now allowed by law as he may think fit, not exceeding, however, fifty per centum of the said rates,' be, and the same is hereby, repealed."

Act of 1875.

The act of March 3, 1875, 18 Stat. L., 341, appropriates \$17,548,000 for inland mail transportation.

"And out of the appropriation for inland mail transportation the Postmaster General is authorized hereafter to pay the expenses of taking the weights of mails on railroad routes, as provided by the act entitled 'An act making appropriations for the service of the Post Office Department for the year ending June thirtieth, eighteen hundred and seventy-four,' approved March third, eighteen hundred and seventy three; and he is hereby directed to have the mails weighed as often as now provided by law by the employees of the Post Office Department, and have the weights stated and verified to him by said employees under such instructions as he may consider just to the Post Office Department and the railroad companies."

Act of 1876.

The act of July 12, 1876, 19 Stats., 79, appropriates for inland mail transportation, separating other than railroad routes from the latter, and—

"For transportation by railroad one million one hundred thousand dollars: Provided, That the Postmaster General be, and he is hereby, authorized and directed to readjust the compensation to be paid from and after the first day of July, eighteen hundred and seventy-six, for transportation of mails on railroad routes by reducing the compensation to all railroad companies for the transportation of mails ten per

centum per annum from the rates fixed and allowed by the first section of an act entitled 'An act making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-four, and for other purposes,' approved March third, eighteen hundred and seventy-three, for the transportation of mails on the basis of the average weight. And the President of the United States is hereby authorized to appoint a commission of three skilled and competent persons, who shall examine into the subject of transportation of the mails by railroad companies, and report to Congress at the commencement of its next session such rules and regulations for such transportation and rates of compensation therefor as shall in their opinion be just and expedient, and enable the department to fulfill the required and necessary service for the public. And to defray the expense of said commission the sum of ten thousand dollars is hereby appropriated out of any money in the Treasury not otherwise appropriated."

Act of 1877.

By the act approved March 3, 1877, 19 Stats., 385, this commission was continued.

Act of 1878.

The act of June 17, 1878, 20 Stats., 142, appropriates—

"For transportation by railroad, nine million one hundred thousand dollars; * * * And provided further, That the Postmaster General be, and he is hereby, authorized and directed to readjust the compensation to be paid from and after the first day of July, eighteen hundred and seventy-eight, for transportation of mails on railroad routes by reducing the compensation to all railroad companies for the transportation of mails five per centum per annum from the rates for the transportation of mails, on the basis of the average weight fixed and allowed by the first section of an act entitled 'An act making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-seven, and for other purposes,' approved July twelfth, eighteen hundred and seventy-six."

Act of 1905.

The act of March 3, 1905, 33 Stats., 1088, appropriates for inland transportation by railroad routes \$40,900,000, of which \$120,000 may be employed for other purposes mentioned—

"Provided, That hereafter before making the readjustment of pay for transportation of mails on railroad routes, the average weight shall be ascertained by the actual weighing of the mails for such a number of successive working days not less than ninety, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

Act of 1906.

The act of Congress approved June 26, 1906, 34 Stats., 467, 472, 473, appropriated \$43,000,000 for inland transportation by railroad routes for the fiscal year ending June 30, 1907, and provided:

"That the Postmaster General shall require all railroads carrying the mails under contract to comply with the terms of said contract as to time of arrival and departure of said mails, and it shall be his duty to impose and collect reasonable fines for delay, when such delay is not caused by unavoidable accidents or conditions."

Act of 1907.

The act of March 2, 1907, 34 Stats., 1212, appropriates—

"For inland transportation by railroad routes, forty-four million six hundred and sixty thousand dollars.

71 "The Postmaster General is hereby authorized and directed to readjust the compensation to be paid from and after the first day of July, nineteen hundred and seven, for the transportation of mail on railroad routes carrying their whole length an average weight of mails per day of upward of five thousand pounds by making the following changes in the present rates per mile per annum for the transportation of mail on such routes, and hereafter the rates on such routes shall be as follows: On routes carrying their whole length an average weight of mail per day of more than five thousand pounds and less than forty-eight thousand pounds the rate shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds; and on routes carrying their whole length an average weight of mail per day of more than forty-eight thousand pounds the rate shall be five per centum less than the present rate on all weight carried in excess of five thousand pounds up to forty-eight thousand pounds, and for each additional two thousand pounds in excess of forty-eight thousand pounds at the rate of nineteen dollars and twenty-four cents upon all roads other than land-grant roads, and upon all land-grant roads the rate shall be seventeen dollars and ten cents for each two thousand pounds carried in excess of said forty-eight thousand pounds."

VI. *Opinion of the Court by Campbell, Ch. J., Concurring Opinions by Booth, J., Barney, J., Downey, J., and Hay, J., Filed March 11, 1918.*

Nos. 31227, 31304, 32812, 32852.

(Decided March 11, 1918.)

KANSAS CITY, MEXICO AND ORIENT RAILWAY COMPANY OF TEXAS

v.

THE UNITED STATES.

THE NORTHERN PACIFIC RAILWAY COMPANY

v.

THE UNITED STATES.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY

v.

THE UNITED STATES.

THE SEABOARD AIR LINE RAILWAY COMPANY

v.

THE UNITED STATES.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

These suits were brought to recover compensation for mail transportation alleged to be due the parties respectively, and have been heard together. A large number of similar cases were taken upon submission when these were heard. The questions involved are substantially the same as those in *Chicago & Alton R. R. Co.*, 49 C. Cls., 463, and *Yazoo & Mississippi Valley R. R. Co.*, 50 C. Cls., 15. The two latter cases were appealed to the Supreme Court, where they were affirmed by an equally divided court. That ruling is not an authority for the determination of other cases. *Hertz v. Woodman*, 218 U. S., 205. It does not follow, however, that the decisions of this court must be ignored by the court itself when similar cases are again presented. The court should have some regard for its own decisions, and in class cases where though the plaintiffs can not appeal or where the defendants do not appeal the court adheres to its ruling and refuses to reconsider cases subsequently presented that are governed by the former decisions. These considerations could very well justify the court's disposition of the instant cases without an opinion. The plaintiffs, however, are entitled to findings of fact because the amounts claimed are sufficient to authorize appeals. It was therefore decided to hear the parties again in argument, and certain typical cases have been prepared with the view to presenting all of the ques-

tions that it is supposed can arise in these so-called divisor cases. The plaintiffs' attorneys have accordingly been heard in extended oral argument and they have filed able and extensive briefs. They have probably left nothing unsaid that would tend either to elucidate the questions involved or to show the right of plaintiffs to recover.

73 As we adhere to the conclusion that the petitions should be dismissed, we will deal more at length with the cases than would be done by the mere announcement of a conclusion of law. There are some differences in the cases, but we think they can all be disposed of in one opinion.

These suits were brought in the years 1911, 1912, 1913, and 1914, respectively. In some of them objection was made to Order 412 hereafter mentioned; in some of them no objection to the order was made. To each of the objections reply was made by the Postmaster General to the effect that no contract would be made which excluded a full observance of the rules and regulations, and at that time Order 412 had been promulgated. The respective adjustment notices which later followed had not been issued; all of the plaintiffs received and transported the mails and were paid therefor periodically according to the terms of Order 412 and the readjustment notices issued by the Postmaster General and without objection or protest when payments were accepted.

The objections or exceptions to Order 412 were general. There was no separate objection based upon a supposed injustice to 6-day routes. The contracts were with the different plaintiffs who operated both classes of routes and contracted for both alike.

The claims may be classified as being (1) claims of what are called 6-day routes, (2) claims of 7-day routes, (3) claims of a railroad on parts of whose line are routes affected by the land-grant act.

An illustration of the claims asserted by some 7-day routes under a supposed implied contract may be taken from a typical route as follows: The mails were actually weighed on the route for 105 days, which included 15 Sundays. The total of the 105 weighings (making the dividend) was divided by 105, and the daily average weight was found to be 143,314 pounds. The maximum statutory rates were applied, and the annual compensation was ascertained to be \$305,253.67. This sum was paid in monthly installments, which, as they severally matured, were received by the carrier without objection of any kind.

If instead of using 105 as the divisor 90 had been used, the daily average weight would have been 167,199 instead of 143,314 as actually found.

Assuming that the actual average weight found by 105 as the divisor fairly represented the actual weight carried each day throughout the year, it would appear that on said route there was actually transported during the year of 365 days something over fifty-two million (52,000,000) pounds of mail, whereas if 90 had been used as the divisor the carrier would have been credited with transporting during the year about sixty-one million pounds, making a difference between what was thus actually carried and what by the use of the divisor 90 would appear to have been carried of about nine million pounds of mail. If the basis adopted was 313 days per year the dif-

ference in the weights under like computations would be approximately seven and a half million pounds. The difference between what the carrier was paid and what it would have received if its compensation had been based upon the result of using 90 as the
74 divisor and the maximum rate would have been about \$46,000 per year. This amount for each of the years in suit is claimed. The actual weight of the mails carried during the year is not shown except by taking the actual average weight per day found as above and multiplying it by 313 or 365 days. The actual weight can not be approximated otherwise.

The action is based upon contract, and plaintiff, denying there was an express contract, relies upon implied contract for recovery as upon quantum meruit. It has been paid the maximum rates provided by law for the average weight of mails actually carried. Can it recover under an implied contract as upon quantum meruit for the nine million pounds of mail which it did not in fact carry and thereby receive \$46,000 per year additional to what it has received?

A contention advanced, however, by plaintiffs is that the law required the use of a "divisor of 90."

Two propositions may be regarded as settled:

(1) That the railroad companies were until the act of July 1916, free to accept or refuse the terms proposed by the Postmaster General for the transportation of mails. Thus it was held in *Alabama Great Southern Railroad case*, 25 C. Cls., 30, 41, decided in 1889, in an opinion by Judge Nott, that railroads other than land-grant roads "are under no obligation to the Government to carry the mail and may decline the service if they will, but that if they do perform, it must be upon the terms and conditions prescribed by the statutes and regulations of the Post Office Department or under an express contract within the limitations imposed by law." This case was affirmed by the Supreme Court, 142 U. S., 615.

In *Eastern Railroad Company*, 129 U. S., 391, 395, it is said:

"After the first of July, 1877, the company was under no legal obligation to carry the mails. * * * We do not mean that the railroad company was bound to continue the carrying of the mails, if subsequent changes in the rates were unreasonable or did not meet with its assent. On the contrary, it was at liberty, when the five per cent reduction was made, to discontinue their transportation on its cars."

In *Chicago, Milwaukee & St. Paul Railway Company*, 198 U. S., 385, 389, it is said:

"A contract may not be forced upon a railway. It may accept, however, and become bound by the action of the Post Office Department."

To the same effect is *Minneapolis & St. Louis Railway Company*, 24 C. Cls., 350, and *Texas & Pacific Railway Company*, 28 C. Cls., 379.

In *L. & N. Railroad Company*, 46 C. Cls., 267, 277, it was declared that the Post Office Department had no authority to compel the company to transport the mail upon terms to which it had not agreed. *Delaware, L. & W. Case*, 51 C. Cls., 426.

(2) The rates stated in the statutes were maximum rates.

After the amendatory acts of 1876 and 1878 herein mentioned were passed a suit was brought in this court involving the construc-

tion of said acts, and in the opinion delivered by Judge Richardson (Eastern Railroad Company Case, 20 C. Cls., 23, 41) it was said:

“Section 4002 of the Revised Statutes, from the act of 1873, does not establish an absolute rate of compensation, necessarily
75 alike to all railroads, for mail transportation, but fixes maximums which are not to be exceeded, leaving the Postmaster General a discretion to make contracts at less rates if he should be able to do so. On that point the language of the section is clear—‘the pay per mile shall not exceed the following rates.’ It is urged that this language is controlled by the preceding words of the section, ‘The Postmaster General is authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned.’ In our opinion the rates there referred to are any rates which the Postmaster General may contract for, not exceeding those therein after mentioned.”

This case was decided January 12, 1885, and upon appeal was affirmed by the Supreme Court February 4, 1889, 129 U. S., 391, 395. In the Supreme Court's opinion, delivered by Mr. Justice Harlan, it is said:

“After the first of July, 1877, the company was under no legal obligation to carry the mails. It carried them after that date under an implied contract that it should receive such compensation as was reasonable, not exceeding the maximum rates prescribed by Congress, and subject to a readjustment of rates as required by the act of 1876.”

Again, in 1889, this court, speaking through Chief Justice Richardson, in *Minn. & St. L. Ry. Co. Case*, 24 C. Cls., 350, said (p. 361):

“In the *Eastern Railroad Case* (20 C. Cls., R. 41), affirmed on appeal (129 U. S., 391), we held that the statute (Rev. Stat., § 4002) did not fix the exact amount to be allowed to railroads, but only the maximum which the Postmaster General could not exceed, leaving to him a discretion to make contracts in his own way at less rates if he should be able to do so.”

And again, in 1893, in the *Texas & Pac. Ry. Co. Case*, 28 C. Cls., 379, it was said (p. 389):

“It seems to be assumed by the claimant that the statutes fix an absolute rate of compensation, while in point of fact they fix only the maximum below which the Postmaster General is authorized to make such contracts as he deems the needs of the mail service may justify.”

In *A. G. S. R. R. Co. case*, 25 C. Cls., 30, 43, decided in 1889, this court, speaking through Judge Nott, and with reference to the portions of a railroad that were land-aided, said:

“But as to these latter portions of the road it was unquestionably within the power of Congress to set a limitation upon the price which should be paid for such service, and thereby to leave the public agent, the Postmaster General, without authority to bind the defendants for any greater price, either by entering into an express contract or by accepting the claimant's services without one; and it was equally within the discretion of Congress to fix different rates for different roads or classes of roads, and in so doing to say that if part of a mail carrier's line was a land-grant road the remainder of the line

should be restricted to the same compensation. Such a restriction would not bind the carrier to carry the mail, but it would bind the Postmaster General not to incur a greater liability, and would be notice to the road at what point his authority to bind the Government by contract terminated."

76 In Jacksonville, Pensacola & Mobile R. R. Co. case, 21 C. Cls., 155, decided in 1886, and affirmed by the Supreme Court (118 U. S., 626), it is recognized that the rates mentioned in the statute are maximum rates.

In A. T. & S. F. Ry. Co. case, 225 U. S., 640, the court construed a provision of the act of March 2, 1907, 34 Stats., 1212, which provides additional pay for railway post-office cars "at a rate not exceeding" designated sums for different lengths of cars. That act was an amendment of section 4004 Revised Statutes in that it changed the maximum rate stated and made some change with reference to the sizes of the cars mentioned in the earlier act. The terms "at a rate not exceeding" are the same in both acts, and section 4004 is in the same language as the second proviso in the act of 1873. The Supreme Court held "The statute defined a car line, but did not fix the compensation. It left that to be determined by the Postmaster General, who could have named any rate not to exceed the statutory maximum." If the language of said proviso to the act of 1873 only fixed a maximum rate, it is difficult to see how the language in the same statute that the pay per mile per annum "shall not exceed the following rates" is to be given a different meaning.

That the rates were "specified maximum rates" was recognized by the Supreme Court as early as 1881 in Chicago & N. W. Ry. Co., 104 U. S., 680, 683. That they were maximum rates is declared by Revised Statutes, section 3999, providing for the contingency that the Postmaster General may not be able to contract within the prescribed maximum rates.

We think it is too late to question the rule stated.

First. It is said in one of the briefs for plaintiffs, speaking of the act of March 3, 1873, 17 Stats., 558, that it "plays the most important part in this case." But that act is not to be considered independently of the balance of the law when we come to construe its meaning.

The act of June 8, 1872, 17 Stats., 283, entitled "An Act to revise, consolidate, and amend the Statutes relating to the Post Office Department," deals comprehensively, as its title imports, with the powers, duties, and responsibilities of that department. It was referred to in the opinion of this court in the Chicago & Alton case and we now mention some of its provisions with more particularity. It contains more than 300 sections and embodies the statutory law relating to the Post Office Department, with perhaps a minor exception not material here. By its repealing clause (sec. 327) it repeals "the following acts and parts of acts and resolutions and parts of resolutions," and there follows a list of the acts and resolutions wholly or partly repealed, beginning with section 2 of the act of March 3, 1791, and concluding with the act of April 27, 1872. Included in the repealed statutes are the act of July 2, 1836, 5 Stat., 800, the two acts of March 3, 1845, 5 Stats., 732, 748, and section 8 of the act of March 3, 1845, 5 Stats., 752. It provides for the estab-

lishment of "a department to be known as the Post Office Department," the principal officers of which "shall be one Postmaster General and three Assistant Postmasters General," to be appointed by the President, by and with the consent of the Senate. The term of office of the Postmaster General is "for and during the term of the President by whom he is appointed, and for one month thereafter, unless sooner removed."

After prescribing in particular some of the duties of the Postmaster General, the act of 1872 provides (sec. 6) that he shall generally superintend the business of the department and execute all laws relating to the postal service.

By section 388 of the Revised Statutes of 1873 it is provided "That there shall be at the seat of government an executive department to be known as the Post Office Department, and a Postmaster General, who shall be the head thereof."

Among other provisions of the act of 1872 the following appear:

Section 46. "That the money required for the postal service in each year shall be appropriated by law out of the revenues of the service."

Section 210. "That the Postmaster General shall arrange the railway routes on which the mail is carried" * * * "into three classes, according to the size of the mails, the speed at which they are carried, and the frequency and importance of the service, so that each railway company shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed." This differs from its predecessor, the act of 1845, in the order of terms and in the introduction of the word "frequency," which did not appear in the act of 1845.

Section 211 provides the maximum pay for the several classes of routes "per mile per annum."

Section 212. "That if the Postmaster General is unable to contract for carrying the mail on any railway route at a compensation not exceeding the maximum rates herein provided, or for what he may deem a reasonable and fair compensation," he may make other arrangements for carrying the mails.

Section 213. "That every railway company carrying the mail shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same."

Section 214 provides that all railway companies which have been aided by a grant of land or otherwise "shall carry the mail at such prices as Congress may by law provide; and, until such price is fixed by law, the Postmaster General may fix the rate of compensation."

Section 256. "That no contract for carrying the mail shall be made for a longer term than four years, and no contract for carrying the mail on the sea shall be made for a longer term than two years."

Section 265 authorizes the Postmaster General to enter into contracts for carrying the mails with railway companies without advertising for bids therefor, and further authorizes him to allow any railway company "with whom he may contract for the carrying of the United States mail, and who furnish railway post-office cars for the transportation of the mail, such additional compensation beyond

that now allowed by law as he may think fit, not exceeding, however, fifty per centum of the said rates."

Section 200. "That all the waters of the United States shall be post roads during the time the mail is carried thereon."

Section 201 provides "That all railways and parts of railways which are now or hereafter may be put in operation are hereby declared to be post roads"; and by sections 202 and 203 canals and plank roads during the time the mail is carried thereon are declared to be post roads.

All of these sections were carried into the revision of 1873 and constitute sections 3997 et seq. and section 3964 and sections 3942 and 3956 of the Revised Statutes, the latter authorizing contracts with railway companies without advertising for bids and declaring that no contract for carrying the mails shall be made for a longer term than four years.

Provision is made (sec. 212, act of 1872; sec. 3999, Rev. Stats.) for the contingency that the Postmaster General may be unable to contract for the carrying of the mail on any railway route at a compensation "not exceeding the maximum rates herein provided, or for what he may deem a reasonable and fair compensation," and he is authorized to contract with others for the service upon the happening of such a contingency. It is manifest that this section, being an authority to a public officer to contract with the railway companies within the maximum rates fixed by the act, "or for what he may deem a fair and reasonable compensation," was something more than a mere authority conferred on him, because the words just quoted are sufficient, when addressed to a public officer, to impose upon him the duty of exercising his judgment as to the reasonableness and fairness of the compensation which he proposes to pay.

It is not necessary when inquiring into the powers and functions of the Postmaster General under such an act as that of 1872 or the revision of 1873 to find expression in explicit terms of all his rights and powers and duties. An applicable rule in such case, stated in one of the plaintiff's briefs and in the Government's brief as well, is as follows:

"A practical knowledge of the action of any one of the great departments of the government, must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined and which are essential to the proper action of the government. Hence, of necessity, usages have been established in every department of the government which have become a kind of common law, and regulate the rights

and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future." *United States v. Macdaniel*, 7 Pet., 1, 14.

Aside from that rule it is plainly deducible from the terms of the statute that there was devolved upon the Postmaster General the duty of contracting with railway companies on terms within maximum rates and that it required of him the exercise of a broad discretion in matters pertaining to the transportation of the mails. In

79 theory at least the expenses of handling the mails by the department were to be borne by its revenues. *Rev. Stat.*, sec.

4054. These were to be covered into the Treasury and the expenses were appropriated for by Congress out of such revenues. From the earliest period the carrying of the mails was under contract, and the act of 1872 made no change in that regard except in the case of land-aided roads. Their duty to transport the mails arose from the statutes granting them aid.

When therefore we come to consider the meaning of the act of March 3, 1873, we must treat it not as a separate and distinct piece of legislation but in connection with the law then upon the statute book, of which, when enacted, it became only a part. By its enactment some material changes in the existing law were made, and those are to be ascertained from a proper consideration of the entire law. Repeals by implication are never favored. Where there is inconsistency between the provisions of the new law and those of the old effect should be given to both if it reasonably may be, and unless there be a positive repugnancy the old law is only repealed by implication pro tanto to the extent of the repugnancy. *Wood's case*, 16 Pet., 342, 363; *Tynen's case*, 11 Wall., 88, 93.

Some significance attaches to the fact that the Congress enacted in the revision of 1873 so many of the provisions of the act of 1872 and incorporated therein at the same time the act of 1873, and to the further fact that those provisions have continued as part of the law. The act of July, 1916, 39 Stats., 425, marked a distinct departure from prior law.

As already stated, the revision of 1873 made the Postmaster General "the head of an executive department," thereby enlarging the first section of the act of 1872. It also by section 4003 made an important change in the proviso from which that section is taken in the act of 1873. The latter act provided that "in case any railway company now furnishing railway post-office cars shall refuse to provide such cars such company shall not be entitled to any increase of compensation under any provision of this act," while section 4003 forbids any increase of compensation under the provisions of "the next section," which provides an increase for the use of the cars. These provisions are in the law because of the adoption of the revision of 1873.

The authority and duty of the Postmaster General to make contracts with railway companies, the provision that no contract for carrying the mails shall be made for a longer term than four years," the right of the Postmaster General to discontinue service on any postal route, the classification of railway routes and the maximum pay therefor, the duty of the Postmaster General to make contracts

with others where he can not contract within the maximum rates provided by the statute or "for what he may deem a reasonable and fair compensation," and other provisions of the act of 1872, have been continued as a part of the statutory law along with the act of 1873.

The act of 1845 had directed that the Postmaster General arrange and divide the railroad routes into three classes according to the size of the mails, the speed with which they were to be conveyed, and the importance of the service, while section 210 of the act of 1872 (sec. 3997 Rev. Stats.) provided for arranging the railway routes into three classes according to the size of the mails, the speed at which they are carried, and the "frequency and importance of the service," so that all railway companies shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed. The "equal and just" rate of compensation mentioned in the act of 1845 gives way to just and proportionate rate in the act of 1872.

The act of 1873 appropriates for an increase of compensation, and provides that the Postmaster General readjust the compensation to be paid for the transportation of the mails on railroad routes "upon the conditions and at the rates hereinafter mentioned," said conditions being, first, that the mails shall be carried with due frequency and speed and that a suitable car be provided, and, second, "that the pay per mile per annum shall not exceed the following rates." (Sec. 4002, Rev. Stats.).

Due frequency and speed and the furnishing of certain cars were conditions, and what should be due frequency and speed, and what the character of the cars, were left largely in the first instance to the determination of the Postmaster General, but being "conditions" it is clearly implied that the matter should be consummated by an agreement of the parties.

Whether in putting in operation the act of 1873 the Postmaster General could have continued to classify the routes into three classes as provided by section 3997 of the Revised Statutes we need not stop to inquire. The authority to do so having been continued, it cannot be positively affirmed that the act of 1873 prevents it. It certainly can not be affirmed that the act of 1873 is inconsistent with all of the provisions of section 210 of the act of 1872 (sec. 3997, Rev. Stats.), which, as stated, still stands upon the statute book as declaring the purpose that some distinctions be made "so that each railway company shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed." The observance of that purpose necessarily involved the exercise of judgment and discretion by the Postmaster General. Nor is there any doubt that the Postmaster General when he first came to apply the act of 1873 made a distinction between at least two general classes of railroad routes, namely, those carrying mails six and seven days, respectively, having regard to the speed and frequency with which they were carrying the mails as well as to the character of the service performed. The law vested in him full discretion to do that, and the right and duty to exercise that discretion necessarily

continued in the office of the Postmaster General. The discretion being vested by statute its exercise by one or more officials could not prevent its exercise by a succeeding one. Macdaniel's case, 7 Pet. 1, 14.

Nor did the act of 1873 repeal section 212 of the act of 1872 (sec. 3999, Rev. Stats.), which imposed a duty on the Postmaster General to contract for the transportation of the mails for a compensation within the maximum rates allowed by law or for less than the maximum rates if his judgment dictated that a reasonable and fair compensation would be less than the maximum. The act of 1872 had provided certain maximum rates to be paid "per mile per annum" and the act of 1873 declared that the "pay per mile per annum shall not exceed the following rates."

We are told that some years prior to 1873 the question of classification of the railroad routes with reference to "the size of the mails" and the other provisions of the law had been a matter of
 81 difficult application and that the Postmaster General had originated a plan by which he called upon the railroad companies to furnish statements of the weights of the mails being carried, and to that end they were asked to weigh the mails for 30 consecutive working days. This they did in many instances, but at times they failed to do so. They weighed the mails being carried on 6-day routes for the 30 days during which they were carried, and they weighed the mails on the 7-day routes during a period of 35 days. In both instances they reported as the average the totals divided by 30. These returns were made the basis of adjustments by the Postmaster General where differences arose in the matter of settlements.

The importance of a change whereby the indefinite term "size" of the mails and other features requiring his judgment would be put in more definite form was called by the Postmaster General to the attention of Congress. We are told that the act of 1873 originated in his office and was intended to effectuate the plan he had conceived for making weight rather than size the basis of compensation. If it was intended to give concrete expression to a requirement that the mails should be weighed in the cases of the two classes of roads for 30 and 35 days, respectively, and the dividend in both cases be divided by 30, the language of the act falls short of making it so. It calls for an average and indicated the number of weighings, and hence literally the divisor is the number of weighings and the dividend is their sum. It limited the number of weighings to not less than 30 and left for the determination of the Postmaster General the number of successive working days on which the mails were to be weighed. It required weighings at least once in four years and left it for the Postmaster General to determine whether they should be conducted oftener. The times when they should be made and their frequency were not fixed by the act. If the act was a departure from the classification contemplated in the prior law, it did not prescribe in terms what differences should be made between routes performing different service. It was known to Congress that some

routes were carrying the mails for 7 days a week, some for 6 days a week, and others for a less time. The relative proportion of 7-day routes to 6-day routes was about one to seven.

While making frequency and speed conditions upon which contracts would be made, the act did not in terms withdraw the injunction in section 210 of the act of 1872 (3997, Rev. Stats.) that contained the legislative expression of the reason and purpose of classifying the railway routes, and its proper observance rested in the discretion of the Postmaster General.

While section 210 of the act of 1872 provided maximum rates for three classes, the act of 1873 provided a graduated scale of maximum rates based upon average weight. It left, however, the adjustment of rates to intermediate weights in the hands of the Postmaster General.

Many features in the act of 1873 rest for their practical operation in the judgment and discretion of the Postmaster General. Some of these are stated in *Chicago & Alton* case, p. 507, and others are found in other parts of the law.

When the Postmaster General came to apply the law he found that the mails were being transported by different railroads for different numbers of days per week, some for 7 days, others for 82 6, and yet others for fewer days. The indicated purpose of the law relating to classification was that the different roads should receive, as far as practicable, a just and proportionate compensation, according to the service performed, and due frequency and speed were conditions entering into the contemplated readjustments. The rates mentioned were limited to designated standards, and the intermediate weights falling between these standards could only be compensated for upon schedules left to the Postmaster General to adjust.

As to those intermediate weights he had discretion, because he could prescribe greater or less rates within the stated standards by making the proportion greater for the smaller intermediate weights than for the larger ones, or he could do the reverse.

The term "weight" had superseded the term "size" in the prior law, but actual weight could not be had without constant weighings, which were impracticable. The average weight carried became therefore the basis upon which the Postmaster General could contract if the railroad companies would agree. An actual average of 30 different weighings would not in the very nature of things show the actual weight transported because it changed (generally increasing) during the year, and the disparity became greater in proportion to the length of the contract term. The weighings were not confined to a given number of days but were to be for not less than a stated number.

The policy of Congress, as indicated by its general legislation on the subject, had been to leave the handling of the business in the Postmaster General's hands under such limitations as they saw fit to prescribe. His duties and his authority (sec. 6, act of 1872) were in a general way defined, among them being that he should "generally superintend the business of the department." In the revision

of 1873 the department appears as one of the executive departments, and the Postmaster General is made the head of it. That the affairs of the Post Office Department bear more analogy to a large business enterprise than to a function of Government is apparent. That in the conduct of it much is and must be necessarily left to the judgment and discretion of its superintendent is also apparent. When, therefore, he found that the act of 1873 provided for an average weight of mail, according to which compensation was to be readjusted and under which contracts for their transportation should be made, was the law under which he was to act mandatory or directory merely? By directory provision it is meant that they are to be considered as giving directions which ought to be followed, but not as so limiting the power in respect to which the directions are given that it can not effectually be exercised without observing them. *Hubbert v. Lumber Co.*, 191 U. S., 70, 76; *De Visser case*, 10 Fed. 642, 648.

Whether an act is directory depends upon the sound construction of its nature and object and of public convenience and apparent legislative intention. If it be merely directory, a deviation from it may subject the official to responsibility to the Government, but can not be taken advantage of by third parties. *Bank v. Dandridge*, 12 Wheat., 64, 81.

In *Martin's case*, 94 U. S., 400, the court held that the eight-hour law of 1868 was a mere direction by the Government to its agent, and did not affect the right of contract. This court has said in effect

83 in an opinion by Judge Barney that the act was merely directory. *New York, N. H. & H. case*. When the daily average was found by either method it was not controlling upon the roads because they could refuse to contract or transport the mails at all. If the act was mandatory a mathematical average would result and the proposed terms could be adjusted within the maximum rate provided the carriers agreed. If the law was directory or permissive a method to be found by the Postmaster General could be adjusted to actual conditions. If he assumed that the rates were fixed or could be enlarged, he was plainly in error, because the courts have held otherwise. If the act was mandatory it marked a departure from the policy of Congress as regards the conduct of this great business enterprise. It had directed a classification to be made so that "as far as practicable" just and proportionate compensation could be made, according to the service performed.

That the act was directory seems to have been the view adopted by the Postmasters General in the early stages of its application, because the defense of the usage in 1885 was based upon the justice of the practice then in vogue and not upon the absolute requirements of the law. Nor could they plainly read into the language of the act of 1873 a requirement that the mails be weighed 35 days and divided by 30. Speaking as it did of a number of weighings, not less than 30, and using the word "average," a literal application of the terms would call for a dividend made up of the sum of the terms in the divisor, and therefore for an actual average; but treating it

as directory would authorize what may be called a permissive average deemed just to the Government and the railroads.

It was materially supplemented in that regard by the act of 1875. By treating it as directory the long-continued usage of the department and the recognition thereof in the repeated appropriations by Congress can be supported. Being directory, it was left to the judgment of the Postmaster General, under such instructions as he considered just to both parties, to ascertain the daily average weight by some other than a mathematical rule. The power was not to be arbitrarily or capriciously exercised, and ample protection against that kind of action could be found in the right of the railroad companies to decline to accept the average as found by refusing to transport the mails or in the course suggested in *Jacksonville R. R.*, 118 U. S., 626, 628. And see *Martin's case*, 94 U. S., 400. It is clear that if the law permitted him to adopt a course of action which to him seemed just the original adoption of it or the continuance of the usage could not take away or limit the right, duty, or powers of his successors to act independently when in their wise discretion changed conditions seemed to warrant a change in the usage. Charged with the same or similar duties and responsibilities, his successors were vested with the same powers he had. Usage alone would not make it mandatory, and, except that a change in the usage would not be allowed to affect the rights acquired under a previous usage, its alteration can not be prevented by parties whose claims arise after full notice of the change. *Macdaniel's Case*, 7 Pet., 1; *Alabama Great Southern R. R. Case*, 142 U. S., 615.

When the Postmaster General came to apply the law he called upon the railroad companies, who were then conducting the weighings, to report the weights to him in accordance with the plan he had originated. The practice followed was to weigh the mail on 6-day routes for 30 days and on 7-day routes for 35 days. The Sunday weights on the 7-day routes were reported as part of the Monday weighings. The totals in both cases were divided by 30 and the quotients were accepted as the average daily weight. This daily average weight on the 6-day routes was thus an actual average, and that on the 7-day routes may be called a permissive average. Very generally the maximum rates prescribed by the statute and by the schedule of rates applicable to intermediate rates as formulated by the Postmaster General were applied to the daily average thus ascertained. If the law required an actual average in all cases it is plain that by the method adopted the 7-day routes were credited with more average weight of mail than they carried, and were therefore paid more than an actual average of their weights would have justified within the maximum rates prescribed by law, a course that can be justified only upon the assumption that the average to be ascertained under the law was not an actual average, but such an average as having regard to the other provisions of the law, the Postmaster General might adopt. That Congress was informed of the method adopted, and by repeated appropriations to meet deficiencies and appropriations based upon these estimates, which in turn were based upon said method, may well be taken as

admitting that the Postmaster General's action was satisfactory to them. They appear to have been equally satisfied with the results of Order 412. They did not change it.

Within less than two years after the act of 1873 went into effect, the act of March 3, 1875 (18 Stats., 341), was passed. That act, we may assume, also originated in the Post Office Department. It provided for a change in the conduct of the weighings and required them to be made by employees of the Department. It carries a provision which we think is of importance in this connection. The prior act had required that the result of the weighings by railroads "be stated and verified in such form and manner as the Postmaster General may direct," while the later act directed that the Postmaster General "have the weights stated and verified to him by said employees *under such instructions as he may consider just to the Post Office Department and the railroad companies.*" [Italics ours.] We do not think that the full force of this expression is found in the suggestion that it merely authorized him to devise some just plan "for obtaining the gross weights," because it is to be assumed that he would have done that anyway. The studied phraseology of the act indicates a broader purpose. It mentions "such instructions as he may consider just to the Post Office Department and the railroad companies" with reference to having the weights stated and verified to him. The Postmaster General by the plan adopted had credited the 7-day routes with possibly one-sixth more than the actual average weight being transported. That he supposed he had the authority may be assumed from the fact that he so exercised it. And it is conceivable, at least, that he would desire a more concrete expression of legislative authority to continue the practice. Chicago & Alton Case, page 516. The act of 1875 may be accepted as authorizing instructions such as were given, whereby the Sunday weights were reported with the Monday weighings. The authority to give such instruction as he might consider just necessarily involved the exercise of judgment and discretion. We see no reason why in the terms of the act of 1875 may not be found an escape from the literalism of the act of 1873, if it is not found in other provisions of the law, because we find that as late as 1884 the Postmaster General, in submitting the question to the Attorney General and stating the method of ascertaining the average weights, said: "The weight on the Sundays being treated as if carried on Mondays." Such, then, were his instructions, because he considered that course just to the Government and the railroads. But that is not to say that the method pursued was mandatory upon the Postmaster General. The fact that he could give instructions involved the right to determine what the instructions should be, and what would be "just" was for his determination. The determination of it at one time, or by one or more Postmasters General, did not affect the right of others to give other instructions and to find that another course was just. The weighings every four years or oftener required, as they occurred, an observance by the then Postmaster General of the injunctions of the law.

The acts of 1876 and 1878 directed a reduction in the rates, and

they were accordingly applied. It was under these acts that the cases arose wherein this court determined that the rates mentioned were maximum rates. They did not affect or establish the divisor.

No further legislation occurred affecting the questions until the act of 1905, which provided that the mails should be weighed for not less than 90 successive working days. Except for the change from 30 to 90 the act of 1905 uses the language of the act of 1873. If literalism be indulged, the language would seem to indicate a change rather than a confirmation of an existing method, but we think the correct view is that Congress still left the direction of the Postmaster General unimpaired. That law did not make permanent or obligatory any divisor.

The next act was that of March 2, 1907, which changed the rates with reference to roads carrying upward of 5,000 pounds of average weight of mails per day. That act did not affect the method of ascertaining the average. Its requirements are met when, to the average ascertained according to a directory statute, the proper rates were applied, the railroads having still the right to refuse to contract at all.

On June 7, 1907, the Postmaster General issued Order 412, which provides "That when the weight of mails is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day." No attempt to apply this rule to existing contracts was made. The rule was intended to be and was applied prospectively in the several contract sections as the quadrennial weighings occurred. We do not find that this rule is subject to the objections which the plaintiffs have urged against it.

Turning now to the contentions of the plaintiffs:

(a) That the railroads were by statute declared to be post roads. No significance attaches to that fact in these cases.

The same statutes declare that canals and plank roads shall be post roads. It has been correctly stated that the establishment by law of all railroads as post roads means nothing more than 86 that the mails could and might be carried over such railroads as over the ordinary public highways, and the mere fact of making such declaration did not, even by implication, indicate that the United States could or would undertake, without the consent of the railroad companies and without making compensation therefor, require any railroad company to transport the mails over its lines. *Atlantic & Pacific Telegraph Co.*, 2 Fed. Cases, 632; *State of Pennsylvania v. Wheeling*, 18 How., 421, 441. Post roads and post routes are not synonymous terms. *Blackham v. Gresham*, 16 Fed. Rep., 609, 611; Congress declares what are post roads, and it requires action by the Postmaster General to authorize railway postal routes.

(b) That what is called the long-continued departmental construction of the act of 1873 is controlling.

It was stated in the *Chicago & Alton* case, page 492, that in the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law and were appointed to carry its provisions into effect is entitled to great

respect, and ought not to be overruled without cogent reasons and may be accepted as determining its meaning. By accepting the view above stated, that the law was directory, and not mandatory with reference to the ascertainment of the average weights, we can find support for the departmental usage that was so long continued. If, on the other hand, the act was mandatory and literal it was not pursued correctly. "It will not be contended that one Secretary has not the same power as another to give a construction to an act which relates to the business of the department. And no case could better illustrate the propriety and justice of this rule than the one now under consideration." Macdaniel's case, 7 Pet., 1, 14. Such is the rule where the change is made prospective and is not given a retroactive operation. The claims asserted here arose after the Postmaster General had changed the order, and they are in no sense rights vested or accruing under a former construction or usage of the department. The distinction is illustrated by Macdaniel's case, where an employee of the Navy Department was held entitled to certain compensation, because he had rendered services under a construction which obtained during the time of the service. He was not claiming under the changed construction, but his rights arose during what might be called the erroneous construction. The distinction is also noted in Alabama Great Southern Railroad Co. case, 142 U. S., 615, 620, where the general rule contended for by plaintiffs is stated, and it is said that the courts will look with disfavor upon any sudden change whereby parties "who have contracted with the Government upon the faith of such construction may be prejudiced"; and it stated further: "It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the payment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the Government." The construction or usage "must be considered binding on past transactions." Macdaniel's case, *supra*, page 15.

In *Midwest Oil Co. case*, 236 U. S., 459, the Supreme Court, three justices dissenting, held that the long-continued practice by the Chief Executive of withdrawing public lands sustained the right to do it in the particular case, though there had been no statute authorizing it. Referring to the cases of continued practical construction it was said, page 473: "These decisions do not, of course, mean that private rights could be created by an officer withdrawing for a railroad more than had been authorized by Congress in the land-grant act." "Nor do these decisions mean that the Executive can by his course of action create a power." The court held that a long-continued exercise of the authority was sufficient to sustain action after it had been taken as against parties whose rights arose thereafter, but it was not held that the rule was mandatory and could not be departed from. Nor indeed can it be stated that the rule is so general as to be applicable in all cases involving departmental action because a principle inhering in our system is that it is a government of laws. It would be a strange conclusion to reach

that departmental usages founded on its own construction of the statute can not be changed by the same authority which gave them birth. The Congress may enact a law which they can amend or repeal; the courts may construe a statute and modify or overrule their decisions. Is the executive branch alone so hampered that it may not modify or change the construction or the usage or practice or methods it may have adopted when such modification or change is given a prospective and not a retroactive operation and when the claims are asserted did not arise until after the usage is changed, and particularly when the usage originated in the exercise of a directory authority?

(c). It is, however, further contended by plaintiffs that their view does not rest solely upon departmental construction, but that it is also sustained by the effect to be given to the passage of the act of 1905 as well as of the acts of 1876 and 1878. Particular stress is laid upon the acts of 1905 and of 1907.

Exception is taken in one of the briefs to the statement in the Chicago & Alton case (p. 512) that "it is evident that Congress was not satisfied with the average weights being obtained, whether the dissatisfaction arose from the method or the result, and they therefore changed the law to insure a more satisfactory average." It can not be denied that under the terms of the act of 1873 the Postmaster General could have weighed the mails for 90 days, more or less, because that act called for weighings for "not less than 30 successive working days." When, therefore, we find a direction in the later act that they shall be weighed hereafter for not less than 90 successive working days, it must be concluded that Congress had a purpose in making the change. If satisfied with the results under the prior law, why enact the later one? If the exception be to the use of the word "method" in that connection it may be conceded that it was not essential to the thought conveyed. It was in effect, if not in words, held that the act of 1905 was not a legislative adoption of the prevailing method for ascertaining the daily average weight and if Congress did not have that method in mind it would seem that the act had no bearing on the question of a fixed divisor one way or the other, since there is nothing in its language to show that they had. Our view of the meaning of the act of 1905 is that it did not affect the powers of the Postmaster General in any regard, whether such powers were statutory or discretionary, mandatory or directory, except to require weighings for not less than 90 successive working days. We might upon that point accept the statement found on different briefs as follows: "This act changed neither the rates nor the basis of pay, but contains the same provision with reference to said basis as that embodied in the act of 1873;" or

That the act "means the same thing in every particular that the act of 1873 meant, whatever that was"; or

That "it lengthened the period for demonstration by weighing but made no change in the elements to be considered nor in the manner of their use or combination"; or

"This act of 1905 did nothing more than make the weighing period include 90 instead of 30 working days."

If, on the other hand, its purpose was to require "a longer period of weighing by which to get, as was supposed, a fairer average of weights," it certainly authorized the official charged with that duty to adopt a method which would accomplish the desired result. The fact that when the act was upon its passage in the House the chairman of the committee changed the language of the bill as reported so that "there could be no question of the construction that can be made of the law" merely confirms the view that the act was not intended to change the law except as to the number of weighings. In fairness it should be stated that the plaintiffs did not by the expressions quoted intend to concede our interpretation of the act of 1873, but they can not find in its terms a positive mandate to pursue the course adopted by the department, and they must have recourse to what is termed the long-continued departmental construction or legislative adoption thereof. Their contention leads to the conclusion that the Postmaster General gave an authoritative and final construction of the statute. This, we think, is beyond his power. The statute does not confer the power of legislation, nor can the exercise of the power have the effect of legislation. *United Verde Copper Co.*, 196 U. S., 207, 215. Every statute, to some extent, requires construction by the public officer whose duties may be defined therein. He must read the law and must, therefore, in a certain sense construe it in order to form a judgment from its language what duty he is directed to perform. *Robert's case*, 176 U. S., 221, 231. There is, however, a distinction between acts involving the exercise of judgment or discretion and those which are purely ministerial. With respect to the former the courts are without power to control executive discretion, but with respect to ministerial duties an act or refusal to act is or may become the subject of review by the courts. *Noble v. Union River Logging Co.*, 147 U. S., 165, 171. We think the course pursued was a matter of usage or practice rather than of construction and finds its support in whatever discretion the act of 1873 vested the Postmaster General with, taken in connection with other provisions of law, supplemented by the act of 1875 authorizing such instruction as the Postmaster General deemed proper. It appears that in "a documentary history of the railway history from its origin, in 1834," which was transmitted to Congress in 1885 by the Postmaster General it was stated that while there had been some little controversy at one time "as to the justness of the present method" of obtaining the daily average weights a little examination would show that "no other way of proceeding could be so just as that now in vogue." Thus it was because he and his predecessors thought that the method was just to the railroads and the Government that he adopted the usage. Proceeding to state that method it is explained in the history that on the 6-day routes the sum of 30 weighings are divided by 30 and "give the daily average," while on the 7-day routes the "weighing is done for 35 successive days (including Sundays) and the aggregate divided by 30 for a basis of pay." Why a succeeding Postmaster Gen-

eral could not with equal right adopt a method of finding an actual average on 7-day routes and dividing the aggregate of 90 days weighings on 6-day routes for a basis of pay is not made entirely clear, when it be assumed that in his wise discretion he decided that the new method was just to the department and the railroad companies and had a proper regard for the purposes of the law.

In the hearing before a congressional joint committee in 1914, it is shown that in 1873 there were 684 six-day routes and only 97 seven-day routes. The aggregate mileage of the first class was then approximately 48,000 miles and of the latter 15,000 miles. The annual pay to the six-day routes was approximately four and three-quarters millions and to the seven-day routes it was approximately two and a half millions of dollars. Charged with the duty mentioned the Postmaster General found the daily average weights, as has been stated, and his action was followed until 1907. When he came to consider the situation in 1907 he found, instead of 684 six-day routes as in 1873, that they had increased to about 1,394 in number, with an aggregate mileage of about 49,000 miles, while the seven-day routes had increased in number from 97 in 1873 to about 1,600 in 1907, with an aggregate mileage of 153,000 miles. While, therefore, the six-day routes about doubled in number in the 34 years the seven-day routes had increased by about 16 times their number during the same period.

From receiving somewhat more than a third of the whole compensation paid for mail transportation by railroads in 1873 to both classes, the seven-day routes were being paid in 1907 about thirteen times as much as the aggregate of the six-day routes. That is, the six-day routes were being paid approximately three and a quarter millions of dollars per annum in 1907, and the seven-day routes were receiving over forty-one millions of dollars.

Assuming that the weights carried bore some proper relation to the pay received it would thus appear that the seven-day routes (which carried so much smaller aggregate weight in 1873 than six-day routes) were transporting in 1907 many times more weight than the six-day routes were transporting.

The relative positions of the two classes had changed in 1907, as has been shown. The greater mileage and the greater weights appeared on the seven-day routes.

When the Postmaster General laid out his course in 1873, he adopted as a basis for the actual average the six-day routes, they being the more in number and carrying the greater weights. He or some of his immediate successors adopted the same divisor for the seven-day routes "as a basis for pay."

If by the act of 1905 there was to be a longer period of weighing by which to get, as was supposed, a fairer average of weights, and only one divisor was to be used, it can not be reasonably affirmed that a fairer average is not attained when, considering all the 90 routes, the basis is laid upon the class which is greatest in number and handles the larger weights.

We are told in one of the briefs that the readjustments of compensation were made upon the basis of "six round trips per week,"

and it is hence stated that "Sunday service never was and is not now within the contract and could be discontinued at any time without a reduction of compensation."

If such be the case, does it tend to support the claim that they be credited each day with an increased average? The theory was that as the seven-day routes carried mail more frequently than others, their daily average should not be actual, and it was increased by the method used. If they voluntarily transported the mails on Sunday, they can not recover for the service; and if they do not contract to do so, why may not the Postmaster General, under such instructions as he may consider just to the parties and within the terms of the law, find the actual average and accordingly agree to pay for what the carrier does contract to carry.

We do not mean to imply that the provision as to six round trips per week means what the plaintiffs suggest. The postal laws and regulations provide for deductions for failure to perform trips, and it is probable that the failure to transport the mails as agreed is visited with fines and deductions. The act of 1906 requires as much.

But the contention is that the divisor became fixed by the passage of the act of 1905 because, it is urged, "that the enactment by Congress without change of a statute which had previously received long continued executive construction is an adoption by Congress of such construction."

The rule stated is found in the *Hermanos* case, 209 U. S., 337, 339, is rested upon the *Falk* case, 204 U. S., 143, and is repeated in the *Komeda* case, 215 U. S., 329, 396. These cases are mentioned in the *Chicago & Alton* case. In referring to the *Hermanos* case it was said that the opinion stated that the contention of the Government that the paragraph under consideration separated distilled wines in bottles into three classes and fixed a specific rate of duty on each and that (1) the court thought the contention was right and needed no comment to make it clear; further, that counsel for the Government "also pointed out" that the tariff act of 1875 and subsequent acts were substantially similar to the paragraph under consideration and that Treasury decisions were in accordance with the interpretation for which the Government contended, and, therefore, it was said, (2) "We have stated that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the department charged with its execution," citing *Robertson v. Downey*, and another case, and (3) the rule above quoted is then stated. It was to this third proposition, in its nature distinct from the other two mentioned, that the *Falk* case is cited. Two of the justices concur "solely because of the prior administrative construction," from which we infer that they did not agree that the first contention of the Government was right and needed no comment to make it clear and hence concurred solely upon another ground, the statement relative to which was in the second proposition, above stated. We repeat these observations not because they are essential to the conclusion we reach but as tracing the history of the rule.

The decisions of the Supreme Court are controlling in this court and their statement that a rule had been announced is authoritative. It is not for us to question the accuracy of

their statement, but when called upon to apply a stated rule we must consider the facts of the case to which the rule is sought to be applied, and we may refer to the conditions under which the rule was announced, because the rule is applicable where similar conditions present themselves. In the cases mentioned the court was considering tariff legislation; and, as is well known, the proper application of tariff provisions frequently calls for construction of the law under which those charged with its execution may proceed and the rights of importers become fixed. Their construction does not involve a discretion to do one or another thing, but does involve a positive duty to execute the law. Men direct their business and import their goods in reliance upon an adopted construction. Provision is made for hearings in tariff matters, where an interpretation of the act may be had, and the Treasury decisions are reported. It may be that the statement of the rule is not to be limited by the character of the cases in which it was announced, but we do not think it was meant that in all cases where a statute uncertain in terms is reenacted without change the court must ascertain from the department charged with its execution the construction which that department put upon the prior act. The court is not absolutely bound to give, but may give, the departmental construction a controlling effect. *Chicago & Alton case*, page 492. And where a given rule is invoked we may have regard to the reason for it, because, generally speaking, the reason ceasing, the rule itself need not be applied.

We do not think it necessary, however, in these cases to even attempt to qualify the rule stated. In an applicable case we would not feel authorized to do so. The rule does not apply here, because we are concerned with what is called a construction, but which is, we think, a usage that had its origin in the duty of exercising judgment and discretion and not in interpretation of doubtful terms under which rights would vest, or which, if changed, would defeat or injuriously affect those rights. If when authorized to adopt a course which to him seemed just to the Government and the railroads, the Postmaster General could pursue the one or the other method of ascertaining the contemplated average then manifestly the method adopted by one could be altered by another so long as the change was made prospective, because being charged with all the duties imposed by law the succeeding Postmasters General were vested with all the powers conferred by law.

The claims of the plaintiffs arose after the issuance of order 412, and no retrospective effect was given to that order. The right to give instructions as to the weighing was as absolute in 1907 as in 1873.

With the wisdom of the change, so long as the right to make it remained, the court has nothing to do. *Wright's case*, 11 Wall., 648.

It may be remarked that the expression in the cases of an unwillingness by the court to depart from a long-continued departmental construction of an uncertain or ambiguous act is referable to the court's action when called upon to construe the law, and they

do not in general refer to the right of a department itself to change its construction while giving it a prospective operation.

92 (d) That proceedings had in Congress at or before the passage of the act of 1907 were a legislative adoption of the divisor of 30 or a recognition of it as a requirement of law.

The act of 1907 did not affect the method of ascertaining the daily average weight. It reduces the rates, and it may be observed that while legislation has touched in rare instances since 1873 the question of compensation, it has uniformly been in the direction of reducing it, except in a limited way as the act of 1907 may affect land-grant roads. Only once since 1873 has legislation referred in terms to the ascertaining of average weights, that being the act of 1905. It may be conceded that by the literalism of the act of 1907 the Congress fixed the rates thereafter to be paid on certain routes, and thus for the first time made a rate that was other than a maximum rate. But in doing that no change was made in the right, power, or duty of the Postmaster General to ascertain the average weights under the permissive features of the law.

As bearing upon the effect of the act of 1907 and upon the method of ascertaining the average weights then in vogue, it is earnestly urged that certain proceedings in Congress, as well as the act of 1907 itself, evidence a purpose on the part of Congress to make permanent the divisor then being used, and that such effect must be given to said act and proceedings.

It is plain that the act does not in terms say what the divisor shall be. The House committee's bill, as reported, provided a method for ascertaining the daily average weight "by the actual weighing of the mails for such number of successive days, not less than one hundred and five." Accompanying the bill was a report explaining the prevailing construction and practice and that the purpose of the said provision was to change the method of ascertaining the daily average weight. This provision in the bill was confessedly subject to a point of order under the rules of the House, and it was accordingly so ruled later. The two amendments offered by a Member were ruled out of order by the Chairman and his ruling was sustained upon appeal. These proceedings were being had in Committee of the Whole House on the state of the Union. The vote that was taken was upon the correctness of the Chairman's ruling, and not upon the merits of the proposed amendments. Placing his ruling upon one of the grounds stated by him that an amendment which will have the effect of changing the discretion vested in an executive officer by law is a change in existing law, the ruling would seem to be correct if we may have recourse to the precedents wherein it is held that an amendment to an appropriation bill having that effect is subject to a point of order. (Hind's Precedents, vol. 4, pp. 569, 570, secs. 3848 et seq.) It may be questioned whether proceedings thus had in Committee of the Whole House on the state of the Union amount to legislation. They can not be accepted as showing the meaning of an act that was adopted containing no reference to the method of ascertaining the average weight. These proceedings were had two years after the act of 1905, where some reference is made to average weights. That the amendments proposed, and for that matter the committee's amendment, would have made definite and mandatory a method of

finding the average weight and would have removed any permissive or directory feature in the law or any discretion of the Postmaster General in its application is plain.

93 Assuming that the statutes under which he acted had authorized the Postmaster General in his discretion to adopt one or another method, the use of the divisor 30 was not mandatory upon his successors, and since Congress has not changed the law, that power continues. We can not say that the refusal of the House, if it were so, to make permanent law on the subject was in fact or effect a making of the divisor fixed and absolute. They can not be said to have included an element which they excluded. Since they refused to adopt the proposed amendments which would have removed the discretion and would have made a fixed divisor of 105, we can not say that they removed all discretion and made a divisor of 90 when the legislation omits any reference to either. Nor is the situation altered by reference to other proceedings in the House and Senate.

The courts have consulted legislative proceedings to learn the history of the period, and it is said in the *Tap Line* cases, 234 U. S., 1, 27, that the debates may be resorted to for the purpose of ascertaining the situation which prompted the legislation.

In *St. Louis & Iron Mountain Railway Co. v. Craft*, 237 U. S., 648, Mr. Justice Van Devanter delivering the opinion, interpreted the law in question according to its terms and then made "a brief reference to the peculiar circumstances in which the new section was adopted," to show that they gave material support to the conclusion to which the court came after considering the terms of the act. After stating the reports of the Judiciary Committees of the two Houses, he adds (p. 661) that while these reports can not be taken as giving to the new section a meaning not fairly within its words, they persuasively show that it should not be narrowly or restrictively interpreted. The act was not silent upon the question involved, and its terms were construed, and this not by what the proceedings showed but by what was "fairly within its words."

Similarly, in *Delaware & Hudson Company* case, 213 U. S., 366, reference is made to certain legislative proceedings, but the court declined to extend the meaning of the statute beyond its legal sense because of a supposed intention not manifested in its terms, and it was said by the Chief Justice that if the mind of Congress was fixed upon a stated proposition, "then we think its failure to provide such a contingency in express language gives rise to the implication that it was not the purpose to include it." This court, in *Atchison, Topeka & Santa Fe R. R.* case, 52 C. Cls., 388, referred to proceedings in Congress for the purpose of ascertaining the subject matter of legislation, to which the mind of Congress was addressed, and to which they gave expression. We can not think that the refusal of one or both Houses to legislate upon a given subject amounts to making mandatory a law which was permissive, or to the withdrawal of a discretion with which an executive officer was charged.

The other cases cited on the briefs are not in conflict with our view.

We hold, therefore, that the Postmaster General had the same authority in 1907 that he had in 1873 and 1875, and thereafter, whether the law contemplated an actual average or a permissive one. Other contentions of plaintiffs are concluded by what has been said.

The case of the land-grant roads depends upon the validity of Order No. 412, and we can not say it was an unlawful exercise of the Postmaster General's discretion under the law. It may be added that the action is by a plaintiff on parts of whose lines are land-aided sections and that the plaintiff contracted for all classes of its routes.

As to all plaintiffs, being free to contract, the considerations to be stated are controlling. Whether the daily average weight should be ascertained according to the literal terms of the act of 1873 or according to the discretion of the Postmaster General, having regard to the questions left for him to solve, the result is the same because in either case their rights were fixed by their contracts to transport the mail.

Second and chiefly: The actions upon contract. Under the views expressed herein, and in the Chicago & Alton and the Yazoo & Mississippi Railroad Company cases, no further discussion of the contention that the statute fixed the compensation is necessary. There was no statutory contract.

It is contended, however, that there was no express contract, and that recovery should be had upon a supposed implied contract, the damages or compensation to be ascertained as upon quantum meruit. While this contention would seem to be a departure from what we think is a proper conclusion from the averments of the petitions, that consideration may be pretermitted.

The general rule is that where one party, at the request of another, does work and labor or performs service for the benefit of such other, the law will imply a promise on the part of the one receiving the benefit to pay the reasonable value of the work and labor done or the service performed where there is no express contract between them fixing the terms upon which the service is to be performed.

"Indebitatus assumpsit is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff. Where the case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfill that obligation * * *. But the law never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law." *Curtis v. Fiedler*, 2 Black., 461, 478; *United States v. Russell*, 13 Wall., 623, 630.

By an express promise a party may agree to pay more than the work and labor done or the service performed is reasonably worth, or he may agree upon a measure for ascertaining the value of the work and labor done or service performed.

It was stated in the Yazoo & Mississippi case that the record did not show a basis upon which the court could properly adjudge what was the reasonable value of the service performed, and plaintiffs urge that the compensation paid for similar service under prior express contracts should be taken as proof of what the service rendered under the implied contract was reasonably worth—that the former course of dealing, in the absence of more definite proof, is sufficient to establish the essential fact. The contention overlooks, however, an important element in the prior express contracts. That element was the authorized exercise by the Postmaster General of discretion in proposing or agreeing to the compensation, and the

court can not supplant his discretion by any of its own, because it has no discretion. What he did in the exercise of his discretion and the performance of his duties when considering his course with reference to a given average weight and the terms of a contemplated contract can not be accepted as proof that a service performed after he had exercised his discretion in another way is to be paid for on the basis which he has rejected. The rule could be applied, as has been done, where both parties understood that the service was being performed without any stipulation by both or offer by either of the terms. To apply it in these cases leads to the result that by refusing to accept the Postmaster General's proposal the carriers can carry the mail, receive regular installments of pay therefor, according to the terms of an offer, and by withholding express assent to a vital term in the offer can impose a contract upon the Government which its agent refused to make. It is well established that a contract can not be imposed upon the carrier. It was not until the act of 1916 that carriers were not free to accept or reject the proposals of the Postmaster General and to refuse to transport the mail.

95 The carrier's rights being well defined, its duties to accept the proposed terms or to refuse to transport the mail is apparent. By its refusal the Postmaster General would have been obliged, in the performance of his statutory duty, to have made other arrangements or to have offered more satisfactory terms. The law will not raise up a promise which involves the breach or defeat of a statutory duty.

When proceeding in a proper case to ascertain reasonable compensation as upon quantum meruit, the pay is commensurate with the service rendered—"that payment should be made for what was done." *Jacksonville, P. & M. R. R. Co.*, 21 C. Cls., 155, 170; *Railroad v. United States*, 101 U. S., 543, 549. A right to recover as upon quantum meruit implies that the party should have such payment as he deserves for the services performed.

To be entirely accurate in such a matter the carrier would have to be paid for the weights carried. These can not be known, and the only basis for them is the ascertained average.

As to the seven-day routes, there can be no question that upon the fullest application of the rule they can not recover as upon quantum meruit in face of the acknowledged fact that they have received payment for the average weight of mails actually carried. Their claims are illustrated near the beginning of this opinion.

If it be conceded that because of a lawful vested discretion the Postmaster General was authorized to contract with railroad companies upon the basis as to 7-day routes of a permissive or factitious daily average weight, and at the maximum rates prescribed by law, and further that Congress by their repeated appropriation recognized or approved his action in that regard, as they had the right and power to do, it must yet follow that a court is without right to increase either the daily average weight or the rates prescribed by statute, whether they be maximum or fixed rates.

On the other hand, if their case rested alone upon that question, it might be said that the average on the 6-day routes could not be decreased. Certainly quantum meruit does not mean that they shall be paid for more average weight than they carried, for more service than was performed, and if the 6-day routes are not strictly in that

situation, it yet follows that the view next stated is determinative and is applicable alike to both classes of routes.

The mails were transported under express and not under implied contracts.

96 Upon the receipt of the distance circular the carrier signed the acceptance, in some instances without qualification, in others with an exception noted therein by its officer, protesting an unwillingness to be bound or refusing to be bound by Order 412. It may be conceded that as to those so objecting there was up to that time no meeting of the minds, and consequently no contract between the parties. Standing alone, "plainly no contract between the parties resulted from the correspondence so far had between them." It is equally true that if the acceptance clause had been signed without exception a carrier could not have sued the Government as for a breach of contract if the mails had not been subsequently offered, because it was yet open to the Postmaster General to adjust the compensation and propose his terms. He was still charged by the statute with the duty of contracting within the maximum rates or for such compensation as he regarded as just and reasonable. But more occurred. The Postmaster General informed the protesting carriers that they could only carry the mails in accordance with the rules, regulations, and laws, and thereafter when he sent to the several plaintiffs the result of his computation, it stated the terms of his proposal. It was not a four-year contract, but was a readjustment of compensation, "unless otherwise ordered," which had the effect of limiting the duration of the contract. *Eastern R. R. case*, 129 U. S., 391; *Delaware & Lackawanna R. R.*, 51 C. Cls., 426. It also stated that the carrier was subject to fines and deductions and to the rules and regulations of the department, and Order 412 was one of these.

A carrier which had qualified its acceptance of the distance circular was not bound to accept the proffered terms. A contract could not be imposed upon the carrier (cases *supra*), nor could it compel the letting to itself of a contract for mail transportation. As is stated in one of the briefs, "it was for the Postmaster General, acting upon his own appreciation of the extent of his lawful power to propose terms, and for claimant, not compelled by law to perform such service, to accept or reject the terms proposed as it saw fit." And while this statement was apparently intended to apply to the situation of the parties as they stood when plaintiff had qualified the terms of the acceptance clause, it none the less correctly states the attitude of the parties thereafter until plaintiff had received and transported the mails and had received periodical payments therefor in accordance with the readjustment notice. The carriers accepted these payments without objection of any kind.

In the *Eastern Railroad Company case*, *supra*, it was said by this court:

"When the extent of an implied contract or the meaning of the language of a written contract are in controversy, the intention of the parties becomes all important. Their acts at the beginning and during the term of the contract acquiesced in on both sides, the claims and construction set up by one party and not denied by the other, go very far to explain, if they do not actually establish by way of

estoppel, the actual contract between them as well as its proper interpretation. (*Otis v. United States*, 19 C. Cls., 467.) The present claimant having no clear and definite time contract was bound to take notice of the Postmaster General's offer of future compensation, and its acts at the time amount to an acceptance of his offer."

97 This case was affirmed in 129 U. S., 391; and it is there said (p. 396):

"Chief Justice Richardson, speaking for the Court of Claims, properly said that the order for the reduction under the act of 1878, and the notice thereof to the company 'constituted an offer on the part of the Postmaster General which the claimant might decline or accept at his pleasure.' Having received the reduced compensation without protest or objection, it may be justly held to have accepted that offer."

In the *Martin* case, *supra*, the Supreme Court stated two principles, both of which are applicable in these cases: The one that the act was merely directory and did not interfere with the freedom of contract, and the other that as the parties were free to contract, effect was to be given to the action and conduct of the plaintiff in having repeatedly accepted, without protest or objection, payments based upon the contract as the Government understood it to be. Other courts have applied the same principles.

In *Coleman's* case, 81 Fed., 824, it is held that even if the construction of the statute therein mentioned is too broad, and the petitioner be entitled to its benefits, he would yet have no right of action in the absence of notice by protest or objection that the payments were not in discharge of the liability.

In *Timmonds' case*, 84 Fed., 933, the Circuit Court of Appeals, Seventh Circuit, took the same view, and, referring to *Martin's* case (p. 934), said:

"It was there ruled that the provision in question is in the nature of a direction by the Government to its agents, and is not a contract between the Government and its servants; that it does not specify what sums shall be paid for the labor of eight hours, nor that the price shall be larger when the hours are more, or smaller when the hours are less;" that being in the nature of a direction, the statute does not constitute a contract to pay for the excess time and that the employee "was under no compulsion, he could have abandoned his service if it proved distasteful or onerous," just as plaintiffs here could have done if there was no express contract.

In *Moses's* case, 126 Fed., 58, the Circuit Court of Appeals, Ninth Circuit, took the same view of the contractual relations between the parties.

In *Averill's* case, 14 C. Cls., 200, 206, it is held that where the employee continued to work, was paid by the day and accepted the payments, he could not maintain his action based upon the theory that eight hours constituted a day's work. *Gordon's* case, 31 C. Cls., 254.

In *McCarthy v. Mayor*, 96 N. Y., 1, the court took the view that the act before them was intended to place the control of the hours of labor within the discretion of the employee rather than of the

employer, and yet held that unless there was an express contract providing for extra compensation, it could not be implied.

In *Grisell v. Noel Brothers*, 36 N. E., 452, the Indiana Appellate Court said that the statute permitted parties to contract, and that if one person employs another to perform work for a stated sum, and at the end of the time pays that sum, and the employee accepts it in payment, he can not afterward recover an additional sum albeit he may have worked for longer hours.

98 "The acts and conduct of the parties in the case supposed are such as to raise a conclusive presumption that the amount received by the employee was accepted in full payment of what was due him. The same rule applies where the work is done by the week or month or year."

It appears in that case, as it does in these, that the plaintiff knew when he entered upon the service the nature and amount of work that was required of him, as well as the compensation he was to receive therefor, and it was said that if he was not satisfied at the end of a day or week with what was being paid him, he should have exacted an agreement for more compensation or exercised his right to quit the employment.

"By continuing in the employer's service under the terms of the employment, he waived any right to claim additional compensation."

The principle is illustrated by *Vogt v. City of Milwaukee*, 74 N. W., 789, where an employee worked 8 hours daily for the first 30 days, and thereafter, without protest, worked 12 hours a day and received the same pay. A city ordinance had provided that 8 hours should constitute a full day's work for city employees. The plaintiffs sued for compensation for overtime and contended that the ordinance entered into and became a part of the contract, and that thereby the city became bound to pay the amount specified for each day of 8 hours' service. A similar contention is made in these cases. The Supreme Court of Wisconsin held otherwise, and said (p. 791):

"The law which allows contracting parties, through the medium of an express contract, to fix in advance the value of a service to be rendered, also allows them to fix the value in cases of implied contract after the service has been rendered. It may as well be fixed by acts of the parties as by express agreement. Here it seems certainly to have been fixed by acts of the parties, and the plaintiff can not now be permitted to dodge or escape the legal effect of his conduct."

It is unnecessary to multiply cases (though some are cited below) to establish the rule that the existence of contractual relations or the acceptance of a proposal can as well be shown by the action and conduct of parties as by their language. What a party does can as well conclude him as what he says he will do. Each time a plaintiff was paid, and received the compensation stated, it "as effectively notified him that his compensation for the time in service was the rate so specified as if he were formally notified." *Vogt v. Milwaukee*, supra, citing *Miller case*, 14 C. Cls., 200.

It was held in *Baird's case*, 96 U. S., 430, where the plaintiff had presented an unliquidated claim to an accounting officer, claiming over \$150,000, which they reduced to about \$97,000, and then sent him a voucher for the latter amount, which he received without pro-

test or objection, that he was concluded by his action in accepting the payment.

The rule was applied in Garlinger's case, 169 U. S., 316, 322, and was recognized in McMath's case, 51 C. Cls., 356.

Cases supra: Central Pacific Co., 164 U. S., 93, 97; Illinois Central R. R. Co., 18 C. Cls., 118, 132, 136; Jacksonville, Pensacola & Mobile Co., 21 C. Cls., 155, 170, 171; 118 U. S., 626; Minn. & St. Louis Ry. Co., 24 C. Cls., 350, 360; Alabama Great Southern R. R. Co., 99 25 C. Cls., 30, *ibid.* 142 U. S., 615; Texas & Pacific Ry. Co., 28 C. Cls., 379, 390; other cases; Chicago & Alton Case, p. 521, 532.

If any effect is ever to be given to a party's action as determining the existence of a contract, these cases call for its application.

It is admitted that the carriers received and transported the mail after the alleged exception to Order 412; admitted that they received compensation in accordance with the readjustment notice; admitted that this compensation was paid monthly or periodically; admitted that the readjustment of compensation was made for no definite period, but "unless otherwise ordered"; admitted that the readjustment of compensation was subject to fines and deductions; admitted in at least one of the cases at bar, and it may be assumed as to others, that fines and deductions were imposed and retained without objection; admitted or shown that the notice stated that the compensation was based upon not less than six round trips per week; admitted or shown that no objection to the payments was at any time made, and that several years intervened before suit, and these things being true, the action and conduct of the plaintiffs were plainly inconsistent with their present contention.

The distance circular proposed no terms and the readjustment notice did. It was the acceptance and transportation of the mail and the repeated acceptance of the monthly or periodical pay after the Postmaster General had replied to the protests, all without protest or objection, that consummated the contract, the terms of which were evidenced by the notice itself. While the carrier had protested it would not consent, it yet consented. A party will not be heard to deny the natural and reasonable effect of his action as regards his contractual relation or to take a position inconsistent therewith when to do so would involve a breach of official duty by the other contracting agent. The law required the Postmaster General to make contracts for mail transportation, to file copies of them (Rev. Stats., sec. 404), and to enforce fines and deductions under the terms of his contracts with railroad companies (act of June, 1903). It did not lie with the carrier to defeat these requirements by a refusal to accede to one term of the proposal and then pursue a course of action antagonistic to the suggested refusal. It can not compel the leaving of the contractual relation to be implied. It could have refused the terms or it could have accepted. It could not select those that served its purposes and leave to the incertitude of the future the ascertainment of the terms upon which the mail was being transported. In a matter of so great public importance, it was its duty to be definite and to speak if it did not intend to be bound. Their action establishes the essential fact. The plaintiffs transported the mails in accordance with the terms proposed by the Postmaster General, and, having been paid the

sums respectively due them, it follows that their petitions should be dismissed. And it is so ordered.

BOOTH, *Judge*, concurring:

I concur in the opinion of the court and might well rest the matter with this statement. Having, however, positive conviction as to the case itself it may not be amiss to briefly discuss some features of the litigation which lead to the foregoing opinion.

The relationship between the carriers and the United States was contractual. The Postmaster General was free under the statute to negotiate and consummate such contracts for the carriage of the mails as he deemed just to both the contractor and the Government, subject only to the express limitations enumerated in the act of 1873. The limitations in the act of 1873, in so far as the present case is concerned, circumscribed alone the maximum compensation to be paid the contractor and prescribed a minimum period of weighing to ascertain the "average weight per mile per annum" upon which the compensation was to accrue. There is nothing aside from these provisions in the statute which irrevocably bound the Postmaster General to contract with the carriers on the basis of the mathematical process adopted by him after the statutory weighing period had been observed; he might pay the maximum compensation; he might pay less; and surely was invested with the official discretion indispensable to the making of an agreement fair to both parties. Within the zone prescribed by the terms of the act of 1873 there was an unfettered field wherein the right of contract was unabridged. The claimant company and the Government within these limits stood upon an equality and the bargain consummated was subject in every way to the ordinary rules governing ordinary contracts. The claimant company accepted the mails and performed its part of the contract in the face of an express provision, directly made a part of the contract, in response to claimant's protest, and finally accepted the compensation fixed in the contract without further protest or objection. *Yazoo & Miss. Valley R. R. v. United States*, 50 C. Cls., 15.

A careful review of all the legislation pertaining to the administration of the Post Office Department, and particularly with respect to the transportation of the mails, discloses a legislative intent to refrain from denying a wide discretion to the Postmaster General in the matter of administrative detail. If Congress designed a fixed and determinate compensation to be paid upon the average mileage basis per annum there would have been no necessity to do more than provide the means of ascertaining the same and thereby limit the contracting authority of the Postmaster General. The various statutes upon this subject, as most pertinently observed by the Solicitor General, were clearly intended to fix a maximum compensation, fair in any event to the railroad company and of sufficient elasticity to protect the Government. The field of fair negotiation, except as expressly provided, was left open, and the railroad company was under no compulsion to accept the terms of a contract it believed to be onerous and unremunerative. (See cases cited in opinion of Chief Justice.) Having engaged to perform a service under the terms of a contract authorized by law and having performed said service and

accepted the full compensation agreed upon by the parties, it is difficult to perceive upon what authority a suit for increased compensation can be predicated in view of the authorities cited in the Chicago & Alton case, 49 C. Cls., 520, 521.

The act of 1873 expressly precludes the possibility of preciseness in ascertaining compensation to be paid the railroad companies for the transportation of Government mails. "The pay per mile per annum shall not exceed * * *. On routes carrying their whole length an average weight of mails per day * * * the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty * * *." This language formulates a method inherently discretionary. The very terms used erect a flexible basis to meet changing conditions and varied circumstances. Thirty days was considered by Congress as the minimum of fairness in the ascertainment of an annual average. Can it be said that a long-continued departmental opinion that the period stated continues to bring to the railways a fair compensation ripens into an unchangeable law, absolutely concluding the department from meeting changed conditions and circumstances? Judge Barney has discussed this phase of the case, and with his discussion I unreservedly agree. I think the statute abounds with express and unambiguous terms which unmistakably repose a wide discretion in the Postmaster General a clear legislative intendment to do no more than prescribe such limitations as Congress deemed wise, leaving the Postmaster General free to act in all other respects.

BARNEY, Judge, concurring:

It has been said that wise men often change their opinions, and I wish to exemplify the fact that unwise men sometimes do the same thing. My views of the act of 1873 will be found expressed in the case of N. Y., N. H. & H. R. R. Co., decided February 25, 1918, 53 C. Cls., —.

I do not think it can be judicially said that by the terms of section 4002 R. S. any divisor was absolutely provided for. The Postmaster General was thereby directed to pay the railroads in proportion to the average weight of the mails carried, this average to be determined by weighing the same at least once every 4 years for not less than 90 working days. Of course this would imply some mathematical process which would involve some kind of a divisor. In any event the compensation paid should not exceed a definite sum named. This weighing, whether by the railroads as at first provided or under the supervision of the Postmaster General himself, was for his benefit alone and for the purpose of enabling him to exercise wise discretion in making contracts for the carriage of the mails. The details to be followed in the weighing in order to approximately obtain the average was entirely at the discretion and under the direction of the Postmaster General. It was for his information it was to be obtained, and it was for him alone to say how this was to be done. I can see why this long continued exercise of this discretion in a certain way should not be changed as to existing contracts because contracts are construed according to the intention of the parties to them when they

were executed, and in this case these existing contracts were understood by both parties to have been executed in the light of the then existing method of obtaining average weights. But I do not see how a discretionary authority can ever be said to ripen into law by continued usage. Presumably the Postmaster General for a succession of years obtained such average weight in a way he thought best adapted to do justice to the different classes of railroads carrying the mails. This discretion seemed to be implied in the law.

Circumstances mentioned and described in the opinion of the Chief Justice became materially changed, and what was perhaps at one time a proper exercise of this discretion became improper, and a later Postmaster General in the exercise of the same power of discretion obtained this average weight in another way. In both instances it was a proper exercise of discretion which was once changed in effect, and can be changed again if reasonably within the statute so as to affect the future contracts for the carriage of the mails.

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DOWNNEY, *Judge*, concurring:

I concur fully in all that has been said by the Chief Justice in the opinion of the court. Perhaps a word more might be added with reference to the theory presented in those cases in which the railroad companies injected into their proposals to carry the mails "upon the conditions prescribed by law and the regulations of the department" an exception with reference to Order 412, that the subsequent delivery of mails to such railroad for transportation by the United States gave rise to a contract in which Order 412 was not embodied. The contention might have force if the transaction rested there. But it did not. The Postmaster General specifically declined to permit any exception as to Order 412 and insisted that the contract should be subject to all the regulations of the department, as in its terms it was, and if effect is to be given to subsequent action of either of the parties, as it undoubtedly must be, it is to be found in the voluntary acceptance by the railroad companies of the mails for transportation under these circumstances, after the specific refusal of the Postmaster General to modify terms, and which action can not be interpreted otherwise than as an acceptance of a contract which was subject to and in which were embodied all the regulations of the department applicable thereto. The service was performed under such a contract, compensation was paid and accepted thereunder, and it seems idle now, because of an antecedent protest or an attempted but rejected modification of terms, to contend that the contract is something else than as entered into or is in some respects not binding upon one party thereto. It is difficult to see any basis upon which, after having entered into a contract not tainted with fraud or duress, performed service thereunder and received compensation therefore in accordance with its terms, the court can now be asked to write and enforce a different contract. The equities of rule 412 are capable of demonstration, the inherent and unexhausted discretion of the Postmaster General is as evident as it was necessary, but in my judgment, while other and related matters are proper subjects of discussion, we have to do, in the last analysis, with a contract relation and must leave the parties where, by their contract, they have placed themselves.

HAY, *Judge*, concurring:

It would seem, and indeed is, a work of supererogation to add anything to the very able and exhaustive opinion of the Chief Justice in this case. In his opinion he has discussed clearly and with singular ability every phase of it. Although I am convinced of the soundness of the views therein expressed, I have deemed it not unwise to very briefly express my views on one branch of the case.

The plaintiffs, in these cases, seem to insist that while the Postmaster General was given discretion, under the law, to determine the manner in which their compensation for carrying the mails may be determined, yet that he, having once exercised that discretion, could not change the method so adopted. The above is a bald statement of their contention. The mere statement of it is its refutation.

103 It would be monstrous to say that an executive officer, clothed with discretion to do certain things, in exercising the discretion given him, is bound to continue to act in the method first adopted by him, no matter whether that method was equitable or inequitable, proper or improper, just or unjust to the parties affected.

The fact that it was a long-continued usage does not change the principle. If in the course of time, it is discovered that the usage adopted is unjust to one of the parties, surely it will not be denied that the executive officer, exercising the discretion conferred upon him by law, can change the method; certainly this must be so when the change is not made to affect any person with whom a contract is being carried out, but applies only to contracts to be made in the future.

The opinion of the Chief Justice fully discusses and covers all the points of the case and I heartily concur in his conclusions.

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VII. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Eleventh day of March, A. D., 1918, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge, and decree that the Northern Pacific Railway Company, as aforesaid, is not entitled to recover and shall not recover any sum in this action of and from the defendants, the United States, and that the petition be and it hereby is dismissed.

BY THE COURT.

105 VIII. *Claimant's Application for, and Allowance of, Appeal.*

Comes now the Northern Pacific Railway Company, Petitioner in the above entitled cause, and by counsel prays the Court to grant an appeal to the Supreme Court of the United States from the decision and judgment of the Court of Claims, in favor of the United States, dismissing the petition, said decision being rendered March 11, 1918.

BRITTON & GRAY,
Attorney- for Petitioner.

Filed May 4, 1918.

Ordered: That the above appeal be allowed as prayed for.
By THE COURT.

May 6, 1918.

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In the Court of Claims.

No. 31304.

NORTHERN PACIFIC RAILWAY COMPANY

VS.

THE UNITED STATES.

I, Sam'l A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law and appendix thereto; of the opinion of the court and of the concurring opinions; of the judgment of the court; of the application of the claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 7th day of May, A. D., 1918.

[Seal Court of Claims.]

SAMUEL A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26,503. Court of Claims. Term No. 445. Northern Pacific Railway Company, appellant, vs. The United States. Filed May 11th, 1918. File No. 26,503.